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Relying on Government in Comparison: What can the United States Learn from Abroad in Relation to Administrative Estoppel?

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Abstract

The United States' Supreme Court has never upheld a claim of estoppel against the government. A citizen relying on the government's advice does that at her peril: if the government wrongfully misrepresents or misinterprets a statute it can (and by some interpretations, *must*) go back on its word leaving the aggrieved citizen with no recourse. The Supreme Court has provided many arguments for this position, but the core of its rationale is premised on protecting what Europeans refer to as "the principle of legality." The principle of legality states that the Executive cannot waive requirements from primary legislation or deviate from statutes, even to protect an individual's reliance. This article demonstrates how similar concerns affect the legal systems of the United Kingdom, France, and Israel. However, embracing this principle comes with a price. There are costs to the (often innocent) citizen who relies on the

* Professor of Law, UC Hastings College of the Law. I would like to thank Anne Joseph O'Connell, from whom I first learned about administrative estoppel in the United States; Margreth Barrett, Evan Lee, and Adam Scales for discussions of the issue and comments on earlier stages. I would also like to thank the participants in the American Society for Comparative Law YIP WIP (Yale-Illinois-Princeton Works-in-Progress) workshop and especially my commentators, Jacqueline (Jackie) Ross and Susan Rose-Ackerman for their insightful and thoughtful feedback. Any errors are, of course, my own. I would like to extend my gratitude to Annie Daher, Jennifer Raghavan Hardin, Fatemeh Shahangian Mashouf, and Nicholas Yu for their excellent research assistance.

government's advice and suffers monetarily or may find herself deprived of autonomy as well. There are also costs to the government: its legitimacy may be questioned and trust lost. The approach of the United States does not balance these costs; it completely favors the principle of legality. The other systems that are discussed here do a better job of balancing the interests of the government and individual while providing protection to the relying citizen. The U.K., France, and Israel not only protect reliance in a number of situations, these countries also provide monetary damages when forcing the government to adhere to its initial position would substantially harm the public interest. By drawing on comparative materials to underscore the interests at stake, this article demonstrates that it is unjustified for a system to fail to protect reliance. In offering an administrative law solution and a monetary remedy in cases where enforcement is inappropriate, I suggest an approach that both balances the principle of legality and also protects citizen interest.

Introduction

Imagine the following two scenarios.

Jane collects disability benefits.[1] Jane wants to work, and the law allows her to earn up to a certain amount of income and still collect benefits. To make sure she does not exceed the permissible earnings maximum, Jane contacts the administrative agency handling her benefits. She asks how much she can earn and still retain her benefits. An official responds by telling her the amount and sending her a copy of the response in writing. The official's response turns out to be erroneous, however, and Jane ends up unknowingly earning more than the amount permitted under the statute. When the administrative agency learns this, it denies Jane's benefits for the time period she worked, basing its decision on the actual state of the law. Jane then sues the agency, claiming it should be estopped from denying her benefits, since the agency made the mistake when

1. This scenario is based on the facts of Office of Pers. Mgmt. v. Richmond, 496 U.S. 414 (1990). Though the presentation here makes the injustice seem harsher—Richmond's annuity was reinstated the following year. *See generally* Christopher S. Pugsley, *The Game of "Who Can You Trust?" – Equitable Estoppel Against the Federal Government*, 31 PUB. CONT. L.J. 101, 108–09 (2001-2002).

misadvising her.

Contrast this to another scenario.[2] A chemical plant applies for a permit to dump certain waste into a body of water. The plant asks the local office of the EPA a number of questions about the meaning of some of the requirements for the permit. The plant receives a written answer. At least part of the answer is directly contradictory to the way the central office of the EPA interprets the Clean Water Act.[3] The plant relies on the answer, invests in preparation of the facility accordingly, and incurring substantial costs as a result. The EPA, upon learning of the error, revokes the plant's permit. The plant sues, claiming the EPA should be estopped from denying the permit because the agency, not the plant, made the mistake.

What should the result be? Under current United States law,[4] claims from each scenario will almost certainly lose.[5] But should they? Even if we accept that the agency cannot be estopped, should no other remedy exist for the plaintiffs? As many scholars point out, this result seems unfair.[6]

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2. This scenario is a dramatically simplified and modified version of United States v. Pa. Indus. Chemical Corp., 411 U.S. 655 (1973). *Contra* United States v. Eaton Shale Co., 433 F. Supp 1256 (D. Colo. 1977) (estopping the government from asserting its claim to invalidate and cancel a patent based on oil shale placer mining claims that it mistakenly issued more than 21 years before). *See also* Mary V. Laitos, Danielle V. Smith, and Amy E. Mang, *Equitable Defenses against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273, 278–79 (2000).

3. 33 USC §1251 and on.

4. Results are less uniform in lower courts. *See generally* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own 'Laws'*, 64 TEX. L. REV. 1 (1985); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992).

5. As developed in Part II, the Supreme Court has never formally rejected the possibility of estoppel applying to the government, but has also never found it to apply to a case brought before it, including Richmond. The second claim has a better chance, since it does not require direct payment of money from the Treasury; however, it would still be problematic—similar claims were denied, for example, in relation to filing annual mining claims, when they were one day late, allegedly because of misrepresentation by a federal official. *See* United States v. Locke, 471 U.S. 84, 89–90 n.7 (1985).

6. *See generally* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2005-2006) (Hereinafter Thomas W. Merrill); Pugsley, *supra* note 2, at 108–09; Raven-Hansen, *supra* note 5, at 1; Schwartz, *supra* note 5, at 653.

This article focuses on government response to situations where agencies[7] erroneously advise private parties to act in a certain way. Problems arise when a private party relies on agency suggestions, but then the agency retreats from its position, leaving the party with the costs associated with its reliance. Most courts in the United States refer to this situation as "administrative" or "equitable estoppel." I will apply the same terminology throughout this article. However, the emphasis is on the effect of reliance while estoppel—as pointed out by Schwartz—is just one of the possible remedies.[8] Since other countries may use different terms to describe similar situations, when I discuss the possible remedies to the situation, this terminological issue will have practical implications when I address the law in other countries.

This article will draw on comparative research to do three things: to add theoretical depth to the discussion, by systematically addressing the values involved and demonstrating what is at stake; to demonstrate the similarities and differences between the approach taken by the United States and the United Kingdom, France and Israel;[9] and to suggest modification of the doctrine as applied in the United States. The article suggests the United States can learn from these systems and should make an effort to protect reliance interests. In doing so, I embrace two solutions: a principled public law approach similar to England, or Israel, using a case by case evaluation as suggested by Schwartz; and as a supplement or alternative, in case the courts of the United States are still reluctant to withdraw from the harsh doctrine regarding estoppel, a monetary remedy in appropriate cases.

Part I describes the United States Supreme Court's approach to estoppel and the criticisms scholars raise against the Court's restrictive approach to protecting reliance. Part II will analyze the different interests at play. Part III demonstrates the approach of the

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7. Naturally "agencies," like corporations, are aggregate entities, and the behavior in question was, in practice, done by an official or several officials that may or may not be representing the central agency. This point will be taken up later.

8. Schwartz, *supra* note 5, at 719—20.

9. Interestingly, as parts II and III will demonstrate, all four countries seek to protect the legality, status, and power of its legislature. The United Kingdom, France, and Israel, however, also give substantial weight to the other values.

United Kingdom, France and Israel, showing how these countries balance the competing interests. Part IV addresses how the law in the United States should change to arrive at more equitable results in these types of cases.

I. Administrative Estoppel in the United States

A. *The Jurisprudence of the United States Supreme Court*

While lower courts have occasionally favored the individual plaintiff in cases where an agency has misrepresented a regulation,[10] the United States Supreme Court has never granted estoppel against the government.[11] It has long "recognized that equitable estoppel will not lie against the Government as against private litigants,"[12] making it clear that a litigant claiming estoppel against the government carries an extremely heavy burden. Though the Court has refused to accept a "flat rule that estoppel may not in any circumstances run against the Government," it has not expressed any clear guidelines for when it would support such a claim.[13] The arguments the Supreme Court uses to justify this approach vary.[14] In early cases, the Court emphasized the doctrine of sovereign immunity.[15] More modern cases found that executive actions must adhere to statute, mostly anchoring this conclusion in the separation of powers principle, under which making law is the legislature's prerogative.[16]

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10. *See, e.g.*, Corniel-Rodriguez v. Immigration & Naturalization Service, 532 F.2d 301 (1976) (estopping the Board of Immigration Appeals); *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030 (1999) (invalidating a notice published by the Federal Aviation Administration).

11. For a detailed, thorough and thoughtful analysis of the cases on the topic, *See* Raven-Hansen, *supra* note 5, at 1; Schwartz, *supra* note 5, at 653. Since this article goes into the jurisprudence of three other countries and since the jurisprudence had been covered in detail, I kept the discussion relatively brief, providing more detail for the more recent cases. For elaboration on those cases, *See* Pugsley, *supra* note 2, at 108–09.

12. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 419 (1990)

13. Heckler v. Cmty. Health Servs, 467 U.S. 51, 60–61 (1984).

14. *See* Pugsley, *supra* note 2, at 101; Raven-Hansen, *supra* note 5, at 1; Schwartz, *supra* note 5, at 653 (explaining the problems with the Supreme Court's reasoning in each case).

15. Utah Power & Light Co. v. United States, 243 U.S. 389, 408–09 (1917).

16. Fred Ansell, *Unauthorized Conduct Of Government Agents: A Restrictive Rule Of*

Again and again the Court refused to affirm executive deviation from congressional acts. For example, in the famous case of *FCIC v. Merrill*, the Court explained that "the oft-quoted observation that '[m]en must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of the courts to observe the conditions defined by Congress for charging the public treasury."[17] Relying on this notion, the Court affirmed the FCIC's refusal to reimburse Merrill for his destroyed crops. This is despite the fact that he explicitly told an FCIC official that the crops were reseeded and after the government told him the crops were insurable and allowed him to sign an insurance policy,[18] the government accepted his several hundred dollars.[19] Scholars have criticized the Supreme Court's estoppel jurisprudence since the *Merrill* decision, pointing to the Court's insensitivity and the injustice to the respondents.[20] Even though the Supreme Court acknowledged this injustice,[21] commentators feel the Court did not give sufficient weight to the inequity.[22] In another case the Court explained that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."[23]

The theme of fidelity to the statute runs in more modern cases as

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Equitable Estoppel Against The Government, 53 U. CHI. L. REV. 1026 (1986).

17. 332 U.S. 380, 385 (1947) [Hereinafter Merrill]. This is especially ironic since the decision in Merrill was based on a regulation created by the agency, not a statute: the statute was silent on the issue.

18. Urban A. Lavery, *The Declaratory Judgment in Administrative Law: A Neglected Weapon Against Bureaucratic Aggression*, 14 FED. RULES DECISIONS 479, 487 (1953-1954). The article in question describes the government's behavior as "fraud" – I would not go that far, but am somewhat surprised – and I will go back to it – that the question of restitution of money already paid was not discussed.

19. *Id.* at 382, 386.

20. Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1953-1954); Lavery, FEDERAL RULES DECISIONS, (1953-1954); Frank C. Newman, *Should Official Advice Be Reliable? – Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Kenneth C. Minter, *Agency – Non-Liability of Government- Owned Corporation for Act of Agent Outside Scope of Actual Authority*, 27 TEX. L. REV. 84 (1948).

21. Merrill, 332 U.S. at 383, 386.

22. Berger, *supra* note 21, at 680–81; Newman, *supra* note 21, at 375.

23. *Heckler*, 467 U.S. at 58.

well. In *OPM v. Richmond*, Charles Richmond relied on a federal employee's erroneous advice and as a result earned more than he was allowed to, in order to continue receiving disability benefits that Congress appropriated.[24] Richmond brought suit after the Navy denied his disability benefits.[25] The United States Court of Appeals for the Ninth Circuit applied estoppel against the government, and the Supreme Court granted certiorari.[26] According to the Court, the award Richmond sought was in "direct contravention of the federal statute upon which his ultimate claim to the funds must rest, 5 U.S.C. § 8337."[27] The Court explained that "[e]stoppel may never justify an order requiring executive action contrary to a relevant statute, no matter what statute or what facts are involved."[28] Relying on the Appropriations Clause of the United States Constitution,[29] the Court appears to authorize a complete bar of estoppel for a whole category of cases, stating that "judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized."[30] The payment of money from the United States Treasury must be authorized by an act of Congress, rather than by the statements of government officials.[31] Furthermore, "judicial adoption of estoppel based on agency misinformation would . . . vest authority in these agents that Congress would be powerless to constrain."[32] Therefore, the Court reversed the decision of the Court of Appeals for the Ninth Circuit and did not allow estoppel against the government.

The scope of *Richmond* is unclear. As Schwartz pointed out, the language of the statute concerned in the case is more specific than many appropriations bills.[33] Unlike many other appropriation bills,

24. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 416 (1990).

25. *Id.* (Navy saying that "the statute directs . . . that the entitlement to disability payments will end if the retired employee is 'restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement.'").

26. *Id.* at 419.

27. *Id.* at 424.

28. *Id.* at 435.

29. U.S. Const. amend. I.

30. *Richmond*, 496 U.S. at 426.

31. *Id.* at 424.

32. *Id.* at 429.

33. Schwartz, *supra* note 5, at 718–20.

the bill in *Richmond* specifically limits apportionment for the payment of benefits to what is authorized by the subchapter of that bill.[34] Furthermore, in his concurrence Justice Stevens disputed the relevance of the Appropriations Clause to the facts in *Richmond*.[35] He stated that "[t]he Constitution contemplates appropriations that cover programs—not individual appropriations for individual payments."[36] Since the Appropriations Clause covers programs, not individual cases, issues of payment based on misrepresentation to an otherwise eligible beneficiary could still be covered.[37] Therefore, the scope of the prohibition in *Richmond* continues to be unclear.

Several cases in the lower courts have been distinguished from *Richmond*; the courts have estopped the government in contexts where money was at issue. In *United States v. Cox*, the Federal Defender's Office relied on guidelines promulgated by the Administrative Office of the United States Courts (AOUSC), the office that administers the funds appropriated to the Federal Defender's Office.[38] The guidelines indicated that the Department of Justice (DOJ) is responsible for the fees of psychiatric examiners who are selected by the defense.[39] The DOJ informed the AOUSC that it did not object to its guidelines, but it later refused to pay fees owed to a defendant's psychiatric expert.[40] Therefore, since the Federal Defender's Office reasonably relied on the DOJ's approval of AOUSC's guidelines, it argued for estoppel against the government for the government's refusal to pay the fees of the psychiatric expert.[41] The decision of the United States District Court for the Eastern District of North Carolina included an order that the government pay

34. *Richmond*, 496 U.S. at 424.

35. *Id.* at 435.

36. *Id.*

37. *Id.* at 435. Despite his statement, Justice Stevens still agreed with the majority's decision and reasoned that Richmond's loss of benefits were temporary and his additional earnings mitigated his short-term refusal of benefits. *See also* Schwartz, *supra* note 5, at 719–20.

38. United States v. Cox, 964 F.2d 1431 (4th Cir. 1992).

39. *Id.* at 1434.

40. *Id.*

41. *Id.* at 1432.

the fees.[42] On appeal, the appellate court distinguished the case from *Richmond,* emphasizing that unlike previous cases, the entity requesting the money is a federal agency.[43] Therefore, there were no concerns about unequal treatment between private citizens and estoppel would not undermine Congressional authority in appropriating funds.[44] The court reasoned, "application of the estoppel doctrine in the present case will have the opposite effect—encouraging the orderly appropriation of funds by preventing government entities from refusing to make budgetary expenditures on items for which they have previously accepted financial responsibility."[45] Therefore, restricting the application of *Richmond* in the circumstances, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision.[46]

In *Burnside-Ott Aviation Training Center, Inc. v. United States,*[47] another case distinguished from *Richmond,* the United States Court of Appeals for the Federal Circuit refused to summarily dismiss a claim of estoppel against the government because there were material issues of fact about the existence of the estoppel. The court concluded that "[t]he *Richmond* holding is not so broad. *Richmond* is limited to 'claim[s] for the payment of money from the Public Treasury *contrary to a statutory appropriation.*'"[48] Since Burnside-Ott's claim for a right to monetary payment from the Public Treasury was based on its contract with the Navy rather than a statute, *Richmond* did not apply.[49] Lower courts have distinguished cases like these, when the party requesting monetary payment was a federal agency rather than an individual citizen and when the payment was based upon a contractual duty rather than a statutory entitlement, from *Richmond.*

Fidelity to the statute, important as it is, is not the only rationale the Court provided for its narrow and restrictive protection of

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42. *Id.* at 1433.

43. *Id.* at 1435.

44. *Id.*

45. *Id.*

46. *Id.* at 1434–35.

47. Burnside-Ott Aviation Training Center, Inc. v. Unites States, 985 F.2d 1574 (Fed. Cir. 1993).

48. *Id.* at 1581 (quoting Richmond, 496 U.S. at 424).

49. *Id.*

reliance. Another argument raised by the Court was the concern about the effect on the public fisc. In cases where estoppel would require payment of benefits to citizens, arguments include concerns about the negative effect on the public fisc from allowing estoppel.[50] It is unclear, however, whether the burden on the public fisc would derive from the need to litigate estoppel claims,[51] the administrative burden of reopening and reexamining all cases where there is an alleged error,[52] or the need to pay back the claimant if the government made a misrepresentation.[53] In terms of the administrative burden on courts and agencies, as Justice Marshall pointed out in more than one dissent, the Supreme Court's refusal to categorically bar estoppel claims against the government means that such claims were viable and sometimes accepted in lower courts. In his dissent in *Richmond*, Justice Marshall further writes, "The door has been open for almost 30 years, with an apparently unnoticeable drain on the public fisc. This reality is persuasive evidence that the majority's fears are overblown."[54] For the cost of reimbursing or providing damages to an individual who relied on misrepresentation (since estoppel only applies to those who rely on a misrepresentation), there needs to be evidence that paying claimants back in these cases would create a serious drain on the public purse. If a decision like *Richmond* came up once in ten years, for example, it would not likely make a big difference to the Navy's disability payments. Charles Richmond's case is an especially painful example of the results of the Supreme Court's strict doctrine. He was entitled to the money until he took the extra work, and he would not have taken the extra work without the agency's advice. Therefore, he lost the money he was entitled to as a direct result. Would protecting his reliance really be such a drain on the public fisc? Charles Richmond lost benefits amounting to $3,993. Even in 2008, at the height of the financial crisis, and after adjusting for current value, paying Charles Richmond that amount would not

50. *See* Schweiker v. Hansen, 450 U.S. 785, 788 n.4 (1981); *Heckler*, 467 U.S. at 63; *Richmond, 496 U.S.* at 428, 433.

51. *Richmond*, 496 U.S. at 433.

52. *See generally Hansen*, 450 U.S. at 788.

53. *See generally Heckler*, 467 U.S. at 63.

54. *Richmond*, 496 U.S. at 442.

have bankrupted the government.[55]

Finally, arguments which oppose estoppel against the government include the Court's concern that if it allows government estoppel, government officials will be more likely to either purposefully offer erroneous advice to circumvent congressional requirements or collude with citizens to defraud the government.[56] The latter suggests a complicated plot in which a government official—in most cases, a relatively low-level official—knowingly gives wrong advice, counting on the agency being bound under the rules of estoppel, in order to subvert congressional commands with impunity.[57] The fear is that this will happen in all cases—even though estoppel is an equitable remedy focused on the particular case. The Court seems to think that under the rules governing agency deviation, it would be bound to treat all subsequent cases according to the wrong representation. However, an agency is not always continually bound by the decision of a low-ranking official. Agencies can deviate from, and therefore fix, previous decisions as long as it is not "arbitrary and capricious" to do so. An agency's potential explanation that, "the previous case was based on error and though we respect that decision to protect the citizen's reliance and not penalize that citizen for our own error, the correct legal decision in the present case is different," is reasonable—not arbitrary or capricious. Thus, while collusion between officials and citizens may be a concern, it may also be overemphasized. Further, the potential for abuse is not always a convincing reason to avoid giving justice to those who deserve it.[58] Any system can be abused. The question whether the potential for abuse is great enough to justify barring

55. *Id.* at 418.

56. *See generally Heckler*, 467 U.S. at 65—66.

57. *Richmond*, 496 U.S. at 428 ("If, for example, the President or Executive Branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc (such as the restriction imposed by the statutory change in this case) and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give this advice the practical force of law, in violation of the Constitution.")

58. Dillon v. Legg, 68 Cal 2d 728, 731—739 (Cal. 1968) ("In the past we have rejected the argument that we should deny recovery upon a legitimate claim because other fraudulent ones may be urged".... "we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.").

compensation deserves its own discussion. Another problem with this theory is the danger to such an official from internal penalties if the digression is discovered. If not discovered by the higher echelons of the agency, the digression will probably not go to court. Hence, the Courts' acceptance, or otherwise, of estoppel against the government is not going to make a big difference to the motivation of officials.

A number of other arguments in favor of a bright-line rule barring estoppel against the government have been raised, however, these arguments are not persuasive. More than one Supreme Court Justice recognizes that there are important interests on the other side, primarily of fairness.[59] Even here though, the Court sees this as the interest of the individual in contrast to the interest of the public. In a democracy, however, individual citizens make up the general public and their interests are to be counted. Even though individual rights are to be balanced against the rights of the general public, everyone collectively benefits from agencies that accurately administer the law and correct their mistakes when appropriate.

Beyond this, the Court does not address the potential impacts of its policy on citizen autonomy. In a world where the government regulates many activities, where businesses often need a permit before action and citizens can be fined for statutory violations it is hard for individuals to act confidently without knowing how an enforcing or permitting agency interprets a regulation. Consequently, the agency is the natural (and sometimes the only) source for citizens to turn to in order to learn how a regulatory scheme is interpreted. Furthermore, the Court does not address the overall harm to the trust in government or the harm to its legitimacy—both of which are already vulnerable in modern states generally and the United States in particular.[60]

Finally, agencies, themselves, have an interest in having citizens rely on their decisions. Compliance will not only be quicker if citizens

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59. Merrill, 332 U.S. at 387–88.

60. Robert A. Kagan, *The Organization of Administrative Justice System: the Role of Political Mistrust*, (2006) (unpublished paper on file with original author); JOHN GASTIL, BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS (University of California Press, 2000); Michael W. Dowdle, *Public Accountability: conceptual, Historical, and Epistemic Mappings* (Michael W. Dowdle ed., Cambridge University Press 2006).

do not need to check externally whether an agency's advice is accurate, but rates of compliance will be also higher if compliance protects citizens even when agencies are wrong. These arguments will be developed further in Part II of this article.

B. Deviations

In 1973, Michael Asimow conducted a survey on federal administrative agencies where he found that many agencies have no written policy about mistaken advice. Despite the absence of a policy, agency officials found it "unthinkable" that sanctions could be taken against individuals who in good faith relied on agency advice, if it provided in a customary manner by the agency.[61] Asimow's survey did point out that agency heads do not see themselves as bound by reliance on informal advice by low-level employees, however.[62] This suggests agencies themselves recognized that reliance on their advice deserves some protection, but limitations existed on their willingness to offer that protection.

The Court has generally refused to declare a complete bar of estoppel against the government and lower courts were left with the problem of identifying under what conditions estoppel against the government will apply. Lower courts have granted estoppel against the government when the government official was acting in some form of "affirmative misconduct."[63] Unfortunately, lower courts did not define the term "affirmative misconduct."[64] And in no case did the Supreme Court affirm such a decision. In *Schweiker v. Hansen*, the Court in essence said that it will know affirmative misconduct when it sees it—and it has not seen it yet.[65] This has not prevented appellate

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61. MICHAEL ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 30–31 (1973).

62. *Id.* at 32.

63. U.S. v. Beggerly, 524 U.S. 38, 118 S.Ct. 186; Schweiker v. Hansen, 450 U.S. 785, 788 (1981).

64. *See* Pugsley, *supra* note 2, at 108 for criticism of the standard's vagueness and lack of definition.

65. Schweiker v. Hansen, 450 U.S. 785, 788 (1981). "This Court has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits. In two cases involving denial of citizenship, the Court has declined to decide whether even "affirmative misconduct" would estop the government from

or district courts from finding for citizens on these grounds from time to time. [66] However, as the Supreme Court held in *Richmond*, "we have reversed every finding of estoppel that we have reviewed."[67] Lower courts have also granted estoppel against the government when the government was acting in a proprietary function. This has happened when the government acts as a private individual in the market—rather than as a sovereign entity. [68] Interestingly, this distinction is actually used in various contexts in civil law countries, and does have important practical implications.[69]

The Supreme Court has also occasionally deviated from its policy of not granting estoppel against the government. However, in these cases the Supreme Court does not use the term "estoppel" when describing the remedy allowed to the winning party. Instead, the Court calls it "entrapment by estoppel" and "equitable tolling."

The first remedy the Supreme Court uses is the doctrine of entrapment by estoppel. The Supreme Court has clearly stated that the government cannot criminally prosecute private individuals acting in accordance with government advice.[70] These cases are

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denying citizenship, for in neither case was "affirmative misconduct" involved. .... This is another in that line of cases." *See also Hansen*, 450 U.S. at 788—89; Schwartz, *supra* note 5, 707 (describing the Court's approach to the issue as "coy, 'we'll know it when we see it'").

66. Corniel-Rodriguez v. INS, 532 F.2d 301, 306—07 (2d Cir. 1976)(INS officer violated INS regulation requiring him to warn applicant for visa under special terms that getting married will result in denial of visa, and she got married in the interim; government was estopped from deporting her); Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982) (estopping Post Office from denying applicant's claim for damages based on assurances by the post office workers that it will be insured up to 50,000); *See also* Portmann, 674 F.2d at 1166—67 (reviewing jurisprudence on affirmative conduct in the courts up to that date).

67. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990)

68. John F. Conway, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 FORDHAM L. REV. 707, 708—09 n.5, 719—22 (1987).

69. FRANK JOHNSON GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS, NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY 151 (Lawbook Exchange Ltd. 2000); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L. L. REV. 611, 623—25 (2003).

70. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674 (1973); Raley v. State of Ohio, *360 U.S. 423* (1959); Cox v. Louisiana, 379 U.S. 559 (1965).

relatively easy to explain. As Joshua Schwartz pointed out in his article, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its own Regulations or Other Misconduct,* considerations of due process and the gravity of the private interests at stake can support estoppel against the government in criminal cases.[71] However, the Court did not explain in detail why the considerations against estoppel in other cases do not operate here or why decisions allowing deportation do not affect interests just as grave, even though they are classified as civil and not criminal.[72] Mr. Schwartz suggests that, in many of the INS cases, the Court's refusal of estoppel did not create an absolute bar to reapply for citizenship or status,[73] but—especially if there was a deportation—the deprivation could be very substantial.[74] Deportation would normally lead to the applicant being barred from the United States for five years and will be a factor in subsequent decisions, and the result of relocation to another country can be grave and irrevocable.[75]

"Equitable tolling," the second remedy, involves cases that are harder to explain.[76] In a series of cases decided not long before *Richmond,* the Supreme Court set aside statutory or regulatory requirements to provide a remedy—frequently monetary—to claimants. The Court described what it was doing as "equitable tolling," or forcing a waiver, but the differences from estoppel are hard to identify. The first case to use the doctrine of equitable tolling was *Honda v. Clark.*[77] In *Clark,* there was disagreement between the United States government and the petitioners, about the correct exchange rate for repaying assets the government took from a Japanese bank under the Trading with the Enemy Act.[78] The lower

71. Schwartz, *supra* note 5, at 728—32.

72. Lenni B. Benson, *By Hook or by Cook: Exploring the Legality of an INS Sting Operation,* 31 SAN DIEGO L. REV. 813 (1994).

73. Schwartz, *supra* note 5, at 737—38.

74. Benson, *supra* note 108, at 813.

75. *Id.* at 822.

76. This discussion draws heavily on Schwartz's excellent analysis. Schwartz, *supra* note 5, at 686—93.

77. *Honda v. Clark,* 87 S.Ct. 1188 (1967).

78. 50 App. U.S.C.A. § 1.

courts dismissed the case because the action was not brought during the sixty-day period dictated in the Act.[79] Claimants were also waiting for the conclusion of a class action suit on the same issue (rate of exchange), and they understandably assumed that the results of that litigation would apply to all future and current claimants, even those who—like claimants—were not part of the class.[80] The Supreme Court reversed, concluding that the issue was not one of estoppel. Instead, the limitation period was, based on the legislative scheme, tolled until the litigation was over. The Court's interpretation of the statutory scheme was extremely broad[81] and emphasized the lack of harm to the government when accepting the claims.[82] Since the assets were not part of the general public fisc the government loses nothing when providing such assets to claimants.[83] While this suggests a difference from *Richmond*, that difference was later denied in *Bowen v. City of New York*, where the Supreme Court accepted the argument of equitable tolling when it said,

> Petitioners argue that *Honda* stands for the proposition that equitable tolling is permissible only in cases in which the public treasury is not directly affected. We decline to hold that the doctrine of equitable tolling is so limited. When application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme, there is no justification for limiting the doctrine . . .[84]

The Court further clarified its approach to equitable tolling in

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79. Clark, 87 S.Ct. at 1189.

80. *Id.* at 1191—94.

81. *Id.* at 1194—96; *See also* Schwartz, *supra* note 5, at 686—89.

82. Clark, 87 S.Ct. at 1197.

83. *Id.* "This case is, however, wholly different from those cases on which the Government primarily relies, where the public treasury was directly affected. Here Congress established a method for returning seized enemy assets to United States creditors, assets that were never contemplated as finding their way permanently into the public fisc."

84. *Bowen v. City of New York*, 476 U.S. 467, 473, 479—82 (1986) (using equitable tolling to allow claimants who have not filed for judicial review within the 60 day statute of limitations established by section 205(g) of the Social Security Act to join a class action brought by severely mentally impaired individuals whose applications for disability benefits were denied by an alleged secret and illegal policy of the Social Security Administration).

Irwin v. Department of Veteran Affairs.[85] In *Irwin*, the Court explained that it would apply a presumption of equitable tolling to statutes of limitations since "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation . . . Congress, of course, may provide otherwise if it wishes to do so."[86] However, the Court limited the circumstances in which equitable tolling would be available to claimants actively pursuing remedies and to claimants somehow tricked by the other party into allowing the deadline to pass.[87] In subsequent cases the Court further restricted the application of equitable tolling when it suggested that the statutes of limitations falls into two categories: defenses that can be waived and jurisdictional limitations that cannot.[88] The Court also stated that if it previously interpreted the statute as creating a jurisdictional limitation period, that previous interpretation stands and equitable tolling is not available.[89]

Of a similar vein are the cases involving a "forced waiver." Those cases address the administrative law requirement that, barring the narrow exceptions, an applicant should exhaust its in-agency remedies before appealing to the court system. This doctrine is well established in the administrative jurisprudence of the United States[90] and is embodied in several statutes.[91] In *Eldridge* and *Bowen v. City of New York*, the Court applied a waiver of administrative remedies even though the plaintiffs did not request a waiver and the agencies involved did not give them one.[92] This decision of the Court was

85. 498 U.S. 89 (1990)

86. *Id.* at 95–96.

87. *Id.* at 96. It should be noted that neither circumstance was in place in *Honda* or in *Bowen* – this is a retrenchment.

88. *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 150–52 (2008); Henderson v. Shinseki, 131 S.Ct. 1197, 1202 (2011).

89. *Gravel*, 552 U.S. at 137–38; *See also, Henderson*, 131 S.Ct. at 1203.

90. McKart v. United States, 395 U.S. 185, 193–96 (1969).

91. *See, e.g.*, 42 U.S.C. § 405(g) (Social Security Act) (conditioning judicial review on exhaustion of remedies); *Mathews v. Eldridge*, 424 U.S. 319, 327–30 (1976) (hereinafter Eldridge). *See also* 42 U.S.C. § 1997e(a) (The Prison Litigation Reform Act of 1995 (PLRA)) (requiring a prisoner to exhaust any available administrative remedies before challenging prison conditions in federal court).

92. Eldridge, 424 U.S. at 328–30 (holding that plaintiff did not raise with the

based mostly on considerations of justice.[93] Once again, the Court refused to allow the agency to use an otherwise legitimate claim because of justice; though the Court also refused to label what they were doing "estoppel."

In sum, whatever language the Court used, it seemed to prohibit government from raising an otherwise valid claim for equitable reasons—like estoppel.[94] The removed requirement was procedural, exhaustion, rather than substantive. However, treating this as a meaningful difference—as the English jurisprudence suggested it could be—runs into a problem. At least some of the estoppel cases, like *Hansen*, where the unmet requirement was a written petition, involve procedural requirements.

C. *Dissents and Scholarly Criticisms, Suggestions for Reform*

Shortly after *FCIC v. Merrill*, Frank C. Newman mentioned specific schemes that protect a citizen's reliance on the government's advice in the *Columbia Law Review*.[95] Newman suggested a general statute would create a remedy for citizens relying on advice from the government, which in essence would overturn the "no estoppel against the government" doctrine.[96] Furthermore, since *Merrill*, the doctrine was taken to task several times with commentators generally

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Secretary his claim before bringing it to court, and leaving the matter to the Secretary's judgment is inappropriate). Bowen, 476 U.S. at 483—85 (allowing into the class members who have not exhausted remedies, seeing this as another case where the equities demand that the court overtake the Secretary's discretion to waive exhaustion).

93. Schwartz, *supra* note 5, at 689—92.

94. *Id.* at 688—89 (reminding us that the basis for relief was weaker than some of the estoppel cases in which the Court denied relief—there was no actual misrepresentation here).

95. Newman, *supra* note 21, at 375—76.

96. *Id; See also* Merrill 332 U.S. at 384 (saying, "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." The language in *Merrill* was harsher than in *Heckler*, *Hansen*, or *Richmond* because it suggests that estoppel may never lay against the government as long as the advising official is stepping beyond her or his authority.)

not finding sufficient justification for its harshness.[97] Two interesting takes on solving the estoppel problem that deserve special discussion are discussed below.

Professor Raven-Hansen suggests one principled way for the Court to address estoppel.[98] His article highlights the potential tension between the *Accardi* doctrine,[99] under which agencies are required to follow their own regulations[100] and the Supreme Court's restrictive approach to estoppel.[101] He sees the problem as a need to balance the interests of private reliance and reliance on agency "law," that is broadly defined to include all agency pronouncements, with public interests in the legislative policies that may be overturned:[102]

> estoppel should be available if the private reliance interest in agency obedience to its own law outweighs the public interest in those legislative policies that would be affected by regulatory estoppel in a given case.

Professor Raven-Hansen sees estoppel as an issue that comes up when an agency breaks its own law.[103] In his view, the guiding principle for distinguishing between types of estoppel is to look at what type of law is at stake, and how it affects the level of expectations that the agency will be correct in the representation. Raven-Hansen suggests that if the government's wrongful conduct was a violation of an agency regulation and the party is claiming she relied on that regulation, her reliance should be protected. This is because the process by which regulations are promulgated makes it

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97. Ansell, *supra* note 17, at 1026; Benson, *supra* note 73, at 813; Conway, *supra* note 69, at 707; Deborah H. Eisen, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609 (1981-1982); Stephen Holstrom, *Estopping Big Brother: The Constitution, Too, Has Square Corners* 33 Western NEW ENG. L. REV. 163, 164 (2011); Pugsley, *supra* note 2, at 101; Raven-Hansen, supra note 5, at 1; David K. Thompson, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551(1979); Deborah Walruth, *Estopping the Federal Government: Still Waiting for the Right Case*, 53 GEO. WASH. L. REV. 191 (1984).

98. Raven-Hansen, *supra* note at 1.

99. *Accardi*, 347 U.S. 260 (1954).

100. Thomas W. Merrill, supra note 7; Elizabeth Magill, *Agency Self-Regulation*, 77; *See id.* at 859, 873–881 (2009).

101. Raven-Hansen, *supra* note 5.

102. *Id.* at 5.

103. *Id.* at 1–2.

predictable that the rules will create reliance and expectations. Raven-Hansen calls this "objective reliance."[104] If the person relies on other agency materials that were either intended to confer benefits and protections on the public, or were created through a formal process (e.g., public participation or publication), the agency creates public expectations that it will comply with these statements.[105] These same expectations attach to a long-standing and well-known agency practice.[106] In all these situations, the pronouncement from the agency is "material" for the public, and reliance on it should be both assumed and be protected.

On the other hand, if there is no public participation in the rulemaking process, and the relied upon guidance is either issued for the agency's convenience or on individual advice, the same expectations of compliance cannot be assumed.[107] A plaintiff whose claim is based on this type of advice must show subjective and reasonable detrimental reliance.[108] No reasonable reliance to the party's detriment—no estoppel.[109] Similarly, in the case of agency misconduct, reliance interests will not be preserved unless the injured party demonstrates reasonable detrimental reliance.[110] However, if the misconduct is especially egregious, courts should relax this requirement.[111]

While this approach appears to be a carefully detailed and principled way to distinguish between cases, it may not be the correct approach. Professor Raven-Hansen defines estoppel as a situation in which an agency wants to deviate from its own law; whether that be a formal legislative regulation, or an individual representation. Raven-Hansen emphasizes the question whether the representation has the force of law, as his yardstick for the different tests. However, this focus does not necessarily capture the equities of the situation.

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104. *Id.* at 47.

105. *Id.* at 48.

106. *Id.* For example, this could account for the D.C. Circuit's decision in Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin., 177 F.3d 1030 (D.C. Cir. 1999).

107. Raven-Hansen, *supra* note 5, at 49.

108. *Id.*

109. *Id.*

110. *Id.* at 50.

111. *Id.*

Under Raven-Hansen's approach, a citizen relying on the advice of an official, as to what agency regulations require, will have a less protection and a heavier burden of proof than a citizen who simply relies on a published agency manual. Is this fair? Is it wrong for a citizen to assume agency officials know the regulations of the agency under which they are employed? Is the individual who seeks out an official for current agency information less deserving than the person who reads an online agency document which may or may not be up-to-date? While Raven-Hansen suggests a solution that appears to have a relatively clear application, it may not appropriately account for the balance of considerations. Professor Raven-Hansen's approach also fails to directly address the need to protect the rule of law (or the principle of legality, as it is called in Europe) and Congress' legislative authority. What happens in cases of direct contradiction with congressional law? Part of the problem is that the values at stake are not sufficiently addressed in a systematic way. This article suggests a detailed inquiry into them is the first step to creating a test.

In another systematic and thorough treatment of the estoppel issue Professor Schwartz[112] criticizes the Supreme Court's jurisprudence, and suggests a different approach to solving the estoppel dilemma. Professor Schwartz's approach has two steps. First, he suggests a solution based on existing public law concepts, under which a party will request the agency to waive the statute, regulation or policy. For cases that fit certain special criteria and for which the first solution would not work, he then suggests a constitutional, due process-based approach.[113] Both of his tests allow for careful weighing of the equities, and as I address later, are my recommended solution for considering whether to apply estoppel (though not the only solution — I propose a monetary remedy where estoppel is inappropriate).

II. The Dilemma of Reliance on Government Representations

This section discusses in further detail what is at stake when we

112. Schwartz, *supra* note 5, at 653.

113. *Id.* Professor Schwartz' solution will be discussed in some depth in part IV of the article, which is why this discussion is relatively short.

consider protecting a citizen's reliance on government representation. It draws on literature from the United Kingdom, France, and Israel to both add theoretical depth to the aforementioned arguments and raise some arguments uncommon in the United States. The section suggests that the balance of considerations supports some protection of reliance, although not in every case, and not necessarily through estoppel. This section also suggests that a case by case approach, while adding complexity and costs, is more appropriate than a categorical bar.

A. The Separation of Powers/Legality Argument and its Weaknesses

While in previous cases sovereign immunity was the basis for not allowing estoppel,[114] that argument is rarely used in the estoppel cases since *Merrill*.[115] *Merrill* and its progeny emphasized the need to respect and support Congress' authority over agencies, referring to the deference as "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[116] This argument can be framed as a problem of separation of powers: Estoppel means that the executive has the right to overturn congressional legislation. In *Richmond*, the government argues estoppel should not be upheld against the government, an argument the court accepts, finding, "to recognize estoppel based on the misrepresentations of Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress."[117]

The Court persuasively reasoned that officials should not be allowed to circumvent or deviate from statutory law by making representations to citizens.[118] This argument has been directly addressed by the jurisdictions of France, the United Kingdom, and Israel using "the principle of legality."[119] In spite of a difference in

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114. Utah Power & Light Co., 243 U.S. at 408–09.

115. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 420 (1990) (stating that *Merrill* was "the leading case in our modern line of estoppel decisions.").

116. *Merrill*, 332 U.S. at 386.

117. *Richmond*, 496 U.S. at 423.

118. *See* Ansell, *supra* note 17, at 1036–38.

119. SØREN J. SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 7 (Oxford University Press. 2000) [hereinafter SCHØNBERG, LEGITIMATE EXPECTATIONS].

terminology, the issue is similar. There is a reluctance to allow agencies to undermine the choices made by the democratically elected legislature.[120] In extreme cases, the government's representation can clearly deviate from enacted statutory law[121] (that was, for example, the case in *Richmond* where agency advice directly violated a statutory requirement.[122]

None of the countries examined here are willing to directly enforce a decision that clearly deviates from a statute.[123] In other words, neither France, the U.K., nor Israel are willing to allow an administrative agency to act outside its mandate, "ultra vires."[124] In spite of the substantial powers of the administrative state[125] and the

120. The United States is a presidential system. Therefore, its model for separation of powers is different from the one used in parliamentary democracies such as Britain. But the problem of respecting the will of the people's representatives exists under either system.

121. *Richmond*, 496 U.S at 417–418. The requirement in question was that the amount earned not exceed 80% of the previous earning in each of the preceding two years; the agency official instructed Richmond according to the previous statutory scheme, which averaged the amount of the earning in those two years. Since Richmond made very little money in the year before his request, when averaged between the two years he would have been below the threshold; but when calculated for the last year alone, he exceeded 80% of his previous earning capacity;

122. ARIEL BENDOR, ESTOPPEL IN ADMINISTRATIVE LAW, 65 (Hebrew University 1994) [hereinafter Bendor], chapter 4, para. 135, p. 65, suggests a different variety of the Separation of Powers principle. This argument, which he calls the "sophisticated" or "clever" version of separation of powers, suggests that since estoppel is applied after a balancing of considerations of equity and leaves quite a bit of discretion for the court, the effect of allowing courts to estop the government will be to give the courts the power to excuse the other branches from following legal requirements, hence allowing the courts to circumvent the will of the elected branches.

123. *See* discussion supra in Part III.

124. *R v. Lockwood*, [1950] 1 Eng.Rep. 148 (K.B).;Rhyl U.D.C. v. Rhyl Amusements Ltd., [1959] 1 All E.R. 257; *Howell v. Falmouth Bout Construction Co. Ltd.*, [1951] A.C. 837; United States v. Stewart, 311 U.S. 60 (1940). SØREN J. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 7 (saying, "All developed systems of administrative law include principles of auto-limitation (non-fettering) and legality (ultra vires, legalité)").

125. KEVIN B. SMITH & MICHAEL J. LICARI, PUBLIC ADMINISTRATION: POWER AND POLITICS IN THE FOURTH BRANCH OF GOVERNMENT (Roxbury Publishing Company 2006) [hereinafter Smith & Licari, Public Administration]; Y. MENY & A. KNAPP, GOVERNMENT AND POLITICS IN WESTERN EUROPE: BRITAIN, FRANCE, ITALY GERMANY (Oxford University Press 3d ed. 1998).

inevitably broad discretion of bureaucrats,[126] democratic theory still emphasizes that the role of bureaucrats is to implement the will of the elected legislature.[127] The traditional view was that administrators do not make policy, they just implement it.[128] The policy-implementation dichotomy has been challenged as a poor representation of reality: implementation carries with it some discretion and therefore often creates a need for policy making.[129] However, it is still the official doctrine of the administrative state. This is for good reason—where there is a clear contradiction the legislature's will must govern the implementation of statutes.

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126. GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES (Richard A. Brody, et al., eds., Pergamon Press 1987); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (Princeton University Press 2007); Giandomenico Majone, *The Regulatory State and its Legitimacy Problems*, 22 WEST EUROPEAN POLITICS 1 (1999); Sweet, Alec Stone and Thatcher, Mark, Faculty Scholarship Series Paper 74 (2002) http://digitalcommons.law.yale.edu/fss_papers/74 [herinafter Thatcher and Sweet].

127. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS § I (Harvard University Press. 1993); John Kingdom, *Britain, in* COMPARATIVE PUBLIC ADMINISTRATION 13 (J.A. Chandler ed. 2000) [hereinafter Kingdom]. *But see,* for a counter perspective: Terrence Kelly, *Unlocking the Iron Cage: Public Administration in the Deliberative Democratic Theory of Jürgen Habermas*, 36 ADMINISTRATION & SOCIETY 38 (2004); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. (2004-2005).

128. Joel D. Aberbach & Bert A. Rockman, *Image IV Revisited: Executive and Political Roles*, 1 GOVERNANCE 1, 2—3 (1988). (The classic image of the relationship between bureaucrats and politicians was that politicians make policy and bureaucrats implement it loyally. But as pointed out by the authors, that image is no longer accepted). *See also* Robert D. Putnam, *The Political Attitudes of Senior Civil Servants in Britain, Germany, and Italy*, in THE MANDARINS OF WESTERN EUROPE: THE POLITICAL ROLE OF TOP CIVIL SERVANTS (Mattei Dogan ed. 1975).

129. James H. Svara, *The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration*, 61 PUB. ADMIN. REV. 176 (2001); James H. Svara, *Complementarity of Politics and Administration as a Legitimate Alternative to the Dichotomy Model*, 30 ADMINISTRATION & SOCIETY (1999); Tansu Demir & Ronald C. Nyhan, *The Politics-Administration Dichotomy: An Empirical Search for Correspondence between Theory and Practice.*, 68 PUB. ADMIN. REV. 81 (2008). *But see* B. GUY PETERS, POLITICIANS AND BUREAUCRATS IN THE POLITICS OF POLICY-MAKING § 1 (Routledge. 2002) (although not accepting the dichotomy, there are real differences in the role and functioning of politicians and bureaucrats); *see also* Tansu Demir, *Politics and Administration: Three Schools, Three Approaches, and Three Suggestions*, 31 ADMINISTRATIVE THEORY & PRAXIS 503 (2009) (describing three schools of thought—the classic dichotomy between politics and administration, a political school that sees bureaucrats as politicians, and interaction, which lies in between).

In democratic countries, citizens elect the legislature, but do not have the same amount of control over the Executive branch. Most political actors are internally appointed and not directly elected to their position.[130] Even in a purely parliamentary system like Israel and the U.K., ministers may have been elected to parliament, but most of the officials likely to be involved in the issues of administrative estoppel were not elected; and the government serves with the confidence of the legislature and is itself bound by its laws.[131] The democratic idea of implementing the will of the people suggests that the legislature, who directly represents the people, should be the deciding body.[132]

Similarly, concerns about bureaucratic power and a desire to prevent agencies from increasing that power without limit support

130. This is true in the United States for all executives at the federal level except the president, of course. In France to the president is elected, and then appoints the rest of the government. Most of the civil service is, however, not elected.

131. Kingdom, *supra* note 174, at 13. As opposed to the parliamentary system in general, in the specific case of *Britain* there is controversy about the degree of control government has over Parliament. Further, some in the past saw Parliament as no more than a rubber stamp for the government's will. For instance, see the article by Susan Sterett, *Judicial Review in Britain*, 26 COMPARATIVE POLITICAL STUDIES (1994) and the book by David Judge, REPRESENTATION: THEORY AND PRACTICE IN BRITAIN 199–200 (Routledge. 1999) (explaining that the government can legislate when and how it wants). On the other hand, others see Parliament as more influential, such as Matthew Flinder, Alexandra Kelso, and Meg Russell. *See* Matthew Flinder & Alexandra Kelso, *Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis*, 13 THE BRITISH JOURNAL OF POLITICS & INTERNATIONAL RELATIONS 249; Russell, M., *Parliament: Emasculated or Emancipated?*, Political Studies Association conference, University of Manchester, Manchester (2009); *Palgrave Macmillan, in* CONSTITUTIONAL FUTURES (Robert Hazel ed. 2008); Anthony King, *Modes of Executive–Legislative Relations: Great Britain, France, and West Germany*, 1 LEGISLATIVE STUDIES QUARTERLY 11(1976); COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 567–72 (Cambridge University Press. 2007).

132. M.D. McCubbins, et al., *Structure and Process, Policy and Politics: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 *(1989). But cf.* Dowdle, Public Accountability: conceptual, Historical, and Epistemic Mappings. 2006; Rubin, MICH. L. REV. (2004-2005); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Yale University Press 2d ed. 1963) (explaining the challenges to the idea that elections really represent voters' preferences.) There is also a tension between this idea of the people's will and expertise, but in democratic countries the nature of the system is that the legislature—un-expert as it is—has the final word.

subjecting it to a higher authority—i.e., statutory law.[133] If the idea of separation of powers is to set one powerful governmental authority against another, and thus bind and limit them both,[134] the bureaucracy is extremely powerful in the modern state.[135] It often combines powers that, in theory, are separated between the other branches.[136] More than any other authority it needs to be limited. The legislature is the natural body to limit it.[137]

Finally, the principle of legality protects the idea of the rule of law. The argument is that the government should be subject to the written, formal law no less than the governed.[138] The government cannot be allowed to deviate from the law except in exceptional circumstances. Allowing the government to deviate because it has made a mistake (or intentionally lied about what the law is) seems to create a dangerous loophole. That is part of the logic behind the Accardi doctrine under which agencies are bound by their own

133. Bendor, *supra* note 123, at 6.

134. Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362 (2008); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995).

135. James Q. Wilson & Patricia Rachal, *Can Government Regulate Itself?*, THE PUBLIC INTEREST(1977); JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (Brookings Institute 1990); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332 (2008).

136. Dobkin, *supra* note 181, at 362; Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157(1996); Gary Lawson, *The Rise and Rise of the Administrative State (in Symposium: Changing Images of the State)*, 107 HARV. L. REV. 1231 (1994). Some, of course, suggest that this is not unique to agencies: there is no strict separation of powers in the United States. *See* M. M. FEELEY & E RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (Cambridge University Press 1998).

137. M.D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. AND ORG. 243 (1987); Louis Fisher, *Micromanagement by Congress: Reality and Mythology, in* THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (Crovitz & Rabkin eds., 1989); Mathiew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AMERICAN JOURNAL OF POLITICAL SCIENCE 165 (1984); Terry M. Moe, *The Politics of Bureaucratic Structure, in* CAN THE GOVERNMENT GOVERN (Chubb and Peterson ed. 1989). *But cf.* ABERBACH, *supra* note 182.

138. Julia Black, *Regulation as Facilitation: Negotiating the Genetic Revolution*, 61 MOD. L. REV. 621 (1998).

regulations.[139] It is also part of the concern about collusion that will be discussed later.

As powerful as the legislative power argument is, it has limits: first, it does not really capture many scenarios of reliance, even those addressed in the cases decided by the United States Supreme Court, where the agency misrepresentation does not directly deviate from statute. Second, it ignores the realities of the modern administrative state. Third, even this argument is not absolute, and in appropriate cases countervailing values should be allowed to trump over it, as developed below. Finally, protecting the legislature's will is, in some cases, an extremely strong argument against enforcing action in contravention of a legislative command, but it's not as strong an argument against other remedies.

1. Clear Illegality?

Sometimes, the issue is clear illegality. In *OPM v. Richmond*, the statute had been changed and the agency's advice simply ignored the change and cited the old statutory scheme. But even in the United States, a violation of the statutory scheme that is not always the case. In *Merrill*, the issue was not a violation of a statutory command. The inability to insure reseeded crops was embedded in the agency's legislative regulations. In *Schweiker* too, the issue was violation of a procedural requirement in an agency regulation.[140] In that case, a mother applying for social security benefits was erroneously advised that she was not eligible, and was not advised to file a written petition—in contrast to the agency's manual. The statute in question only allowed benefits if a petition was filed. The agency's regulation interpreted this as requiring a "written petition." In both cases the Court explicitly treated the regulation as law, but for the purpose of this specific argument, the separation of powers or legality argument, the situation is not quite similar.[141] In one sense, there's a stronger case for refusing to protect expectations there: If one justification for the principle of legality is the rule of law, assuring the government will also be subject to rules and that it will be a "government of laws

139. Merrill, *supra* note 7, at 586–87.

140. Schweiker v. Hansen, 450 U.S. 785, 788 (1981).

141. Merrill, 332 U.S. at 380.

and not of men,"[142] the agency should be held to formal law, including its own regulations. However, the argument that the will of the elected legislature should trump over the citizens reliance is weakened, though not inapplicable here. Regulations are issued pursuant to power delegated to an agency by statute, but regulations endorse a certain interpretation. The representation may still be within the boundaries of the delegating statute—there's nothing in *Merrill* to say that insuring reseeded wheat was against the initial statute, and in fact, there are indications it was not. The concern about the abuse of power does not apply in exactly the same way either. Here, the concern is that government will use representations to undermine their own regulations—to avoid applying them without abolishing them. This is problematic on a number of levels, and will be analyzed separately in the next section, but for the moment, suffice it to say that there is also a problem with allowing agencies to externalize the costs of their employees negligently, or worse, intentionally, misrepresenting the agency's own regulations in a way that causes damages to citizens.

In other cases the violation that adhering to the agency's representation will lead to is not of regulations. In *Heckler*,[143] the specific question was whether salaries of certain employees were reimbursable under Medicare. This depended on the interpretation of a user manual created by the Department of Health and Human Services, an interpretation the advising body should have referred to HHS for but did not. In other words, this was not a situation where the decision to reimburse was clearly in contrast to a congressional statute, or even to agency regulations; it was a matter of how to interpret the regulations.

Quite a few of the English cases addressing legitimate expectations deal with situations where the agency made a representation that it will interpret the statute in one way, and then went back on that representation. For example, in *HTV v. Price Commission,* the court decided that a public authority which led traders to rely on one interpretation of a statutory provision could only adopt another interpretation if there was "an overriding public

142. Mass. Const. art XXX

143. *Heckler*, 467 U.S at 60.

interest" in doing so.[144] Similar rulings were made in relation to taxation, where the courts found that it was an abuse of power to go back on a precise and unqualified representation.[145]

Not only does the issue of reliance come up in many situations where the issue is agency interpretation of statute or regulations, it may easily come up when the agency is exercising its discretion. A classic situation is an enforcement scenario: when it comes to enforcement, agencies have substantial discretion when to enforce and when not to enforce legislation and regulations.[146] If an agency promises it won't enforce the regulation in a certain situation and then changes its mind, a citizen may be harmed. Or if the agency makes a decision that changes an interpretation a citizen relied on, that citizen may suffer. For example, in *Hoctor v. United States Department of Agriculture*,[147] Mr. Hoctor, who raised big cats, was told by a veterinarian of the USDA who inspected his property that to be licensed to raise those cats he would need a six-foot perimeter fence around all his property. Mr. Hoctor did so—and a year later, the Department, in a manual provision, told inspectors to require an eight-foot fence for dangerous animals. In 1990, seven years later, Hoctor was cited and sanctioned for the fence not being the proper height.[148] The issue here was not a direct violation of a statute; it was a change in interpretation.

In the *Coughlan* case,[149] the applicant was a gravely disabled patient who agreed to be transferred from the hospital where she received treatment to a National Health Service facility relying on a promise that the institution would serve as their "home for life." Later the authorities decided to close the institution. The decision was not illegal—it was clearly within the authorities' discretion, but in violation of the representation given to petitioner, and when petitioner claimed she would not have agreed to the transfer without a promise of permanent residence, the court protected her reliance.

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144. *HTV v. Price Commission* [1976] ICR 170, 185. *See also* SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 109.

145. *Id.* at 110 n.21.

146. Schwartz, *supra* note 5, at 7.

147. Hoctor v. United State States Department of Agriculture, 82 F.3d 165 (7th Cir. 1996).

148. *Id.* at 168.

149. *R. v. North and East Devon Health Authority, ex p. Coughlan*, [2000] 2 W.L.R. 262 (H.L).

In another situation,[150] local authorities, mistakenly thinking they had a duty to supply homeless refugees with permanent accommodations, promised those refugees secure accommodations. After the House of Lords decided there is no such obligation, the question was whether the authorities' promise binds them to provide such accommodation. Again, the promise was not in violation of a statute.

In spite of the fact that citizen reliance on government advice does not always—or even usually—involve direct violation of a statute, the courts in the United States apply the same restrictive standard in all cases.

2. *The Realities of the Modern Administrative State*

The reason that so many situations in which reliance needs to be protected do not involve statutes is because agencies make so much of the law which applies to individuals in the modern administrative state.[151] Statutes often provide agencies substantial room to fill in details. And implementation carries with it substantial amounts of discretion.[152] As pointed out elsewhere, administrative agencies combine legislative, executive and adjudicative powers.[153] The interaction for individual citizens or corporations is often between them and the agency and includes the broader dance between the agency, Congress, President and Courts (which is less relevant to the specific reliance problem). It is the agency that is in charge of implementing the statute to which the citizen will naturally direct questions about implementation; and the agency on whose words she will rely. Asking the agency for answers about the legislative scheme they are implementing is the simple, logical and practical thing to do for a citizen seeking to manage her affairs and comply with the law.

The Supreme Court based its estoppel jurisprudence in part on

150. *R. (on the application of Bibi and Al-Nashed) v. Newham London BC* [2002] 1 W.L.R 237.

151. Smith & Licari, Public Administration, *supra* note 172.

152. Christopher J. Jewell & Bonnie E. Glaser, *Toward a General Analytic Framework: Organizational Settings, Policy Goals, and Street-Level Behavior*, 38 ADMINISTRATION & SOCIETY 335 (2006); MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 3—4 (Russell Sage Foundation 30th Anniversary Edition ed. 2010).

153. Charles H. Koch, *Policy Making by the Administrative Judiciary*, 56 AL. L. REV. 693 (2005). *See also* Lawson, *supra* note 183 (viewing the administrative state as unconstitutional for exactly that reason).

the presumption that the citizen knows the law.[154] Yes, the citizen is constructively presumed to know the law, but in the administrative state there are pages on pages of legislation and secondary legislation.[155] Who is it more realistic to expect will know the regulations applying to a particular agency—the agency's staff that works with the material day in and day out, or the citizen who has to interact with multiple agencies each day?[156] And if the agency tells the citizen that its regulation says X—as in Merrill—there is at least a case for protecting a citizen who assumes the agency knows the regulations governing it and relies on its word.

3. Other Values

Even if we accept the importance of separation of powers, it is not clear that in every case separation of powers and legality should trump over the countervailing values. There are very few instances in which our system provides absolute protection to any value, regardless of what is on the other side. Freedom of speech is limited in certain important cases.[157] Parental rights and freedom of religion have been limited in certain cases.[158]

Why would separation of powers be dominant in this case? I will elaborate on the values protected here in subsection II.B., but in short, they include fairness to the citizen, protecting citizen autonomy and promoting government legitimacy and effective administration. The financial hardship to the citizen was mentioned in several of the cases (though it is my impression it was underestimated); but the potential injury to citizen autonomy and the effect on trust in government were

154. *Heckler*, 467 U.S. at 64 (saying "This is consistent with the general rule that those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law.").

155. *See, e.g.*, Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process – For Better or Worse*, 34 OHIO N.U. L. REV. 469 (2008) (regarding the growth in volume of the federal register). *See also* CLYDE WAYNE JR. CREWS, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (Competitive Enterprise Institute 2008) (regarding the growth in the number of rules).

156. KENNETH J. MEIER, POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT 62–3 (Harcourt College Publishers 4th ed.)(2000).

157. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 917–20 (2009).

158. *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

not. And they should be considered as part of the picture.

4. Other Remedies

In the most extreme case, the only way to directly enforce the representation relied upon is for the agency to be allowed or ordered to ignore a statutory command. As explained, that raises very real concerns of democratic legitimacy and potential abuse of power by agencies. But the same concerns do not come up if, instead of enforcement, the remedy is providing reliance damages—monetary damages—to the injured citizen.[159] To protect both citizen reliance and the principle of legality, the courts could refuse direct enforcement—but then compensate the relying citizen for damages directly resulting from the reliance (upon proof of certain elements). This proposal will be developed in section IV.

B. Protecting Individual Autonomy and Government Legitimacy

For a variety of reasons, protecting the individual's reliance on government representation is important. From the point of view of the individual, they need to be able to plan ahead and foresee the results of their actions, in order to be able to act autonomously and to make choices about their lives. Knowing the legal framework in which they operate—having some degree of legal certainty—is important for such autonomy.[160] Without the ability to rely on official representations, such certainty decreases dramatically.[161] Given the vast discretion that administrative agencies possess,[162] anticipating an agency's action is very hard without any input from them; and not being able to rely on representations negates the value of such input.[163]

Not only that, but administrative authorities have reasons to

159. Daphne Barak-Erez, *Protecting Reliance in Administrative Law*, 27 MISHPATIM 17 (1996) [hereinafter Daphne Barak-Erez]

160. *Id.* at 164. That, after all, is one of the reasons for the principle of legality in criminal law.

161. *Id.* at 12—13.

162. Barkow, HARV. L. REV., 1333—1335 (2008); Bryner, *supra* note 173; MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (The Free Press 1964); Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 60 ADMIN. L. REV. (2008).

163. Barak-Erez, *supra* note 160, at 13.

want citizens to rely on their representations and to turn to them for advice. To assure the smooth running of their functions, agencies want the citizens and regulatees to follow their requirements. If it's a matter of enforcement, even if the agency has all the resources it wants—and most agencies today do not[164]—it probably has other things it wants to dedicate resources to, besides enforcement. If it's just a matter of managing its work, things run more smoothly if the requirements are clear. The best source for understanding a complex administrative scheme with substantial ambiguities is asking the agency in charge of enforcing it.[165] If the citizen cannot rely on what the government is saying not only will the citizen have substantial costs in figuring out what the requirements are,[166] which will reduce the social utility of the regulatory scheme without any real benefits, there will also be delays in implementation. If the issue is one where the government is regulating the market in some way, not protecting expectations will undermine the ability of government to credibly commit in ways that will allow businesses to act with confidence—people or businesses will hesitate to rely in future.[167] Of course, in areas where the government is the "only game in town"—e.g. pollution permits—people will have no choice. However, if there is substantial uncertainty in those areas, investors may not invest in technologies that require access to an unreliable government—or they may invest less.

A less utilitarian argument starts from the premise that the modern state exists for its citizens. Government "by the people, for the people"[168] suggests that government agencies should serve citizens, not cheat or negligently mislead them.[169] To push the argument further, the principle of legality aims not at reducing the rights of a citizen, but at protecting them, by reducing the ability of

164. Paul Pierson, *From Expansion to Austerity: The New Politics of Taxing and Spending, in* SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY (Martin A., Landy Levin, Marc. K., Shapiro, Martin M. ed. 2001); Richard J. Jr Pierce, *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 645 (1997).

165. Bendor, *supra* note 123, at 26.

166. *Id.*; Barak-Erez, *supra* note 160, at 29.

167. *Id.* at 20, 31—32.

168. Abraham Lincoln, The Gettysburg Address (Nov. 19 1863).

169. Barak-Erez, *supra* note 160, at 29.

government to deviate from the law and abuse its powers.[170] Using this principle to prevent a citizen from holding government to its representation goes against its fundamental goals.

From the point of view of the public administration, allowing government to go back on a representation it made would undermine trust in government and government's legitimacy. If the government breaks its word—and furthermore, the courts allow it to break its word—how can what it says be trusted?[171] Holding government to its representation, on the other hand, should help control public authorities—if they know they will be held to their representations, they will be more careful in making them, and hopefully, those representations will better reflect actual law and policy.[172]

C. Dangers to Administrative Integrity: The Risk of Collusion and Abuse

One of the concerns raised by the Court is the danger of collusion and abuse.[173] The idea is that a regulator, wishing to go beyond its mandate, or to deviate from the rules binding it, will intentionally misrepresent the law —with or without the cooperation of the relying party—and if the law will protect third party reliance, the representing party will thus be bound to its illegal misrepresentation.[174] This could allow agencies to avoid congressional requirements—generally, or in specific cases where the regulator is particularly close to or sympathetic to the regulated industry. A concern of a similar vein is that accepting estoppel will allow low-level officials in the agency to avoid the instructions of the center, undermining hierarchical control.[175]

It is possible for an agency member to collude with a private party to avoid congressional law or the instructions of the agency's center. In one example,[176] Charalambe Boutris, an inspector for the

170. Bendor, *supra* note 123, at 26; Barak-Erez, *supra* note 160, at 153.

171. *Id.* at 25.

172. *Id.* at 35.

173. *Heckler*, 467 U.S. at 65—66.

174. Bendor, *supra Note* 123, chapter 4, pp. 62—64.

175. Magill, *supra* note 147, at 859.

176. Russell W. Mills, The Promise of Collaborative Voluntary Partnerships: Lessons from the Federal Aviation Administration, IBM Center for The Business of

FAA at the Southwest Airlines (SWA) office, was responsible for the airframe and systems of the airline's fleet of Boeing 737 jets. As early as 2003, Boutris found that SWA records of airworthiness directives did not meet the requirements of the law. He informed the SWA maintenance officials and recommended to his Supervisory Principal Maintenance Inspector, his superior, Douglas Gawadzinski that they file a letter of investigation against SWA. Gawadzinski refused and instead offered to conduct a safety attributed investigation to see if the airline was in compliance with federal regulations: which Gawadzinski eventually approved a year later. On March 15, 2007, SWA informed Gawadzinski that 47 of their aircraft had over-flown the required fuselage fatigue inspection and on March 19, 2007, SWA filed a voluntary disclosure claim with the FAA. Shortly afterwards Boutris learned that the affected aircraft were still flying in passenger operations until March 23, 2007 and that six of these aircraft had cracks up to four-inches in the fuselage (USHTI Hearing 4/3/2008). On the VDRP application, Gawadzinski had falsely confirmed that SWA had ceased operations of the planes after they discovered the crack in the fuselage, while in reality they allowed the 47 aircraft to continue in service for up to 30 months after they were due to be inspected. This was a direct violation of the regulation. While direct collusion appears to be less common than problems with compliance which result from agency members having too much trust in the regulated industry;[177] such collusion does happen on occasion.

However, relying on estoppel to get around a regulation seems a very problematic, roundabout way to achieve the goal. Let's distinguish between two scenarios: seeking noncompliance with the rule and seeking to benefit a specific private party. If the end sought is avoiding the rule, we have a situation where the agency dislikes the

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Government Report, Sept. 2010, at 8

177. P. GRABOSKY & JOHN BRAITHWAITE, OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES 197–98(Oxford University Press 1986); James Kwak, *Cultural Capture and the Financial Crisis, in* PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION, AND HOW TO LIMIT IT 455 (Daniel P. Carpenter & David Moss eds., Forthcoming); T. Makkai & John Braithewaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 JOURNAL OF PUBLIC POLICY 61(1992); JAMES S. TURNER & RALPH NADER, THE CHEMICAL FEAST: THE RALPH NADER STUDY GROUP REPORT ON FOOD PROTECTION AND THE FOOD AND DRUG ADMINISTRATION (Penguin 1970).

congressional statute or the local office dislikes the command of the center, and the end goal is completely avoiding it. In that case, estoppel, which is a case specific remedy, does not seem to achieve that goal. It is true that agencies may be found arbitrary and capricious [178] if they deviate from their own previous decisions without an explanation.[179] Although that is the standard, previous decisions of an agency previous decisions are not considered precedent under any strict interpretation of the term and an agency may deviate from a previous decision if there is good reason to do so,[180] like, for example, if the previous decision was based on error. If an agency makes an argument in court that it is bound to adhere to a previous misrepresentation, that argument would be unconvincing. One concern here is that when an agency uses a representation that a party relied on, it is unclear who would be in position to complain—in terms of knowledge or in terms of standing. If the representation worked for a certain party, that party won't complain, and you would need an external actor with enough interest in the matter to watch out for it and take steps. So in some cases an agency may consistently deviate from a mandate. It does not seem, however, that this scenario raises a real threat of widespread deviation from congressional requirements or agency regulations.

If a local office is deviating from the center's desire, once the center discovers the deviation, it can be fixed, creating a possible remedy for collusion. *Alaska Professional Hunters* creates an obstacle to this, since in that case, the FAA's central office was held by the D.C. Circuit to the regional office's interpretation;[181] though even there, there was no indication of intentional rebellion of the regional office against the center, rather, an error of interpretation seemed to be at issue. At any rate, later cases dramatically cut into *Alaska Professional Hunter*'s holding[182] and it has never been embraced by the Supreme Court or by another circuit. The reasons seem to be twofold: it gives substantial weight to non-legislative rules, in a way that seems to

178. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2013).

179. *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994).

180. *Id.*

181. Alaska Professional Hunters Association Inc. v. FAA, 177 F.3d 1030, 1032 (Dist. Ct. App. 1999).

182. *E.G. Metwest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509–12 (D.C. Cir. 2009).

contradict the APA; and it undermines the control of the agency's central (chief) office over its local offices.

In the other scenario, an agency colludes with a private entity by making an official representation that the entity can rely on. Estoppel will be relevant in cases where the agency's decision, if not the collusion itself, is detected and the agency is forced—because of external pressures—to go back on its word. Or when a regional office's promise is overturned by a central office, because if the agency's decision is not known, the other party will get what it wants and no one will be the wiser—and there will be no question of estoppel. If collusion can be shown, as in the case of *Southwest* above, a reliance claim will probably be rejected. There is no unfairness to a private party in reversing a benefit it only got through underhanded means.[183] So the question is, should we refrain from protecting reliance in order to avoid the cases in which the agency was acting in a problematic way, but the private party was not involved, or if collusion cannot be shown. We do not know how common such cases are; and blanket denial of protection to citizens without evidence of collusion because there may be undetected collusion in some cases seems very problematic. Before going there, I would like evidence that collusion does, indeed, happen in a substantial portion of cases.

D. Social Utility and Cost Allocation

The Court emphasized the risk to the public fisc. While I pointed out that in *Richmond* the amount in question was low, and that estoppel probably does not have precedential value, in other cases the amount can be more substantial. In *Heckler*, the Court said:

> Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds.[184]

In that case, the amount in question was $71,480,[185] which is

183. Just as when immigration finds a marriage fraudulent it can revoke a Greencard. Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases within the Scope of the Constitution*, 15 AM. U. J. OF GENDER SOC. POL'Y & L. 743 (2006-2007).

184. *Heckler*, 467 U.S. at 63.

185. *Id.* at 57.

substantial. The potential harm to the public purse if the government has to pay for it is one consideration for limiting the remedy, but should not be the end of the discussion. There are also costs to not having the government pay for it. From a social utility point of view, one cost is that refusing to protect reliance will lead to individuals incurring expenses as part of reliance, which ends up being wasted, and social waste is never a benefit.[186] Not only is this a waste, but it is unfair to make the party investing in reliance bear those costs. The costs are there, and someone has to pay. If the government made an error, placing the costs of that error on one party—the relying individual—is unfair. In a real sense, allowing agencies to go back on their representation means externalizing the costs of mistakes: the government made the mistake, but the recipient citizen will have to pay for it.[187] A strong argument can be made that the costs of government errors should be internalized by the government. From a point of view of fairness, again, requiring the government, and not the relying citizen, to pay for such errors would spread the cost among the general public, by forcing the government to either keep to its representation or pay damages out of the public purse.[188]

In line with these tort-style arguments, the counter argument to the idea that government will collude with citizens in circumventing the law is that protecting reliance will deter negligent misrepresentations and lead the government to be more careful in its advice, since it can be forced to pay for its mistake.[189] One can argue that there are other controls in place to prevent agencies from misrepresentations, be they negligent or otherwise, which includes the risk of judicial review, something no sane public official wants, and of bad publicity.[190] It's unclear, however, how powerful these other controls are in a system where the courts have a clear approach

186. Barak-Erez, *supra* note 160, at 20.

187. *Id.*

188. Bendor, *supra* note 123, at 2727; Barak-Erez, *supra* note 160, at 27; *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944).

189. Barak-Erez, *supra* note 160.

190. Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, 2005 Issues In Legal Scholarship, The Reformation of American Administrative Law (2005). Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures* 12 NYU J. LEG. PUB. POL'Y 321, 350–370 (2009).

of not protecting reliance,[191] and where many of the cases involve small, individual stories, which may not get the attention of the press.

E. Other Issues

Besides the principle of legality, a number of other arguments go against protecting reliance. One concern is that protecting one party can harm others. If we consider the second example I provided—giving a permit to a plant to pollute—protecting the plant's reliance, if done through direct enforcement, can harm the environment and the health of those that rely on the water.[192] Similarly, giving a license or benefit to one party, based on a representation, can harm another party that did not get that license. This can happen if the regulation is in place to overcome a market failure, for example, a regulation to prevent the harm from a monopoly.[193] In a case like this, the parties involved are not just the regulator and the regulated industry, but also the third parties for whose protection the regulation was created. Allowing the regulator to respect the regulated industry's reliance may harm those parties. But since this will not always be the case, it seems problematic to have a general rule limiting estoppel just because of that. Effects on a third party are one of the things to consider, but do not justify the almost absolute position the court currently takes.

Another possible concern is the equal treatment of similar cases. If other parties are denied the benefit in the name of the law, it is unfair to grant it only to one party. But equality means treating like cases alike, while treating different cases differently. The party towards which the government gave a misrepresentation, who then

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191. Though even in the United States, in the lower courts, arguments of estoppel were sometimes accepted, so the risk exists, and may be enough. *See* Klein v. Securities & Exchange Comm'n, 224 F.2d 861 (2d Cir. 1955); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Georgia-Pacific Corp., 421 F.2d 92, 103 (9th Cir. 1970) (holding that estoppel could be applied against the government, because " . . . the dictates of both morals and justice indicate that the government is not entitled to immunity from equitable estoppel in this case."); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); Schuster v. Comm'r, 312 F.2d 311 (9th Cir. 1962); United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.d. Wash. N.d. 1942); Cinciarelli v. Reagan, 729 F.2d 801 (D.C. Cir. 1984).

192. Barak-Erez, *supra* note 160, at 30.

193. Bendor, *supra* note 123, at 6.

relied on it, is not situated similarly to all other claimants. That party relied on a misrepresentation so the harm to it is worse than the harm to a similarly situated party without such reliance.

F. Conclusion

The discussion above strongly suggests that the balance of considerations probably support some protection of reliance, though the force of the counter arguments suggests that the protection should be on a case by case basis, and not absolute.

III. Reliance in Comparison: How Do Other Systems Balance These Considerations?

The starting point of this discussion is that there is a common core between the three systems to which I am comparing the United States to. In the U.K., France, and Israel there is a strong emphasis on the principle of legality: an authority cannot act outside its legal authority. The principle of reliance is only acknowledged to a limited extent if it directly clashes with legality—though each system offers at least some potential protection. All three systems, however, protect reliance to some degree when the issue is not blatant illegality and may offer a monetary remedy. What seems to be happening is that the systems are trying to find a practical solution to the relying citizen's problem without sacrificing the principle of legality.

A. Britain

After some thought, the British House of Lords—now the Supreme Court [194]—decided that estoppel does not usually apply to public authorities.[195] But although estoppel itself is not used, there is substantial protection of reliance on lawful representations, a protection that increased over the first decade of the twenty-first century.

The legal tool used by English law in these circumstances is the doctrine of "protection of legitimate expectations."[196] Under this

194. Constitutional Reform Act, (2005) ch. 4, c.4.

195. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120; R. (Reprotech (Pebsham) Ltd.) v. East Sussex CC [2002] UKHL 8, [2003] 1 W.L.R. 248.

196. Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction*

doctrine, in certain circumstances, expectations generated due to an individual's reliance on a representation of the administration will be protected.[197] The courts have struggled with several questions: when will such reliance be protected; should the courts protect only procedural reliance, or also substantive reliance; what should be the effect of legitimate expectations on the administrative decision; and by what yardstick should the administration's behavior be measured.

In *Rowland*,[198] the court summarized the doctrine of legitimate expectations as follows:

> By a representation (a term which embraces a regular practice and a course of dealing) a public body does not give rise to an estoppel but may create an expectation in another ("the citizen") from which it would be an abuse of power to resile: R v East Sussex County Council ex parte Reprotech Pebsham Ltd [2002] 4 All ER 58. The principle of good administration prima facie requires adherence by public authorities to their promises. Whether it does so require must be determined in the light of all the circumstances. The public body can only be bound by acts and statements of its employees and agents if and to the extent that they had actual or ostensible authority to bind the public body by their acts and statements: South Bucks District Council v Flanagan [2002] 1 WLR 2601 at 2607 para 18 per Keene LJ. False The expectation may be

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between the Reliance and Expectation Interests, 11 EUROPEAN PUBLIC LAW 583 (2005); HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 1083–92 (T&F Books 8th ed. 2010) [hereinafter BARNETT]; , Legitimate Expectations, *supra* note 120. The court in *Reprotech* found an "analogy" between the doctrine of legitimate expectation and the doctrine of estoppel, but said that "There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see [Coughlan]. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public that the authority exists to promote. Public law rights can also take into account the hierarchy of individual rights which exist under the Human Rights Act of 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (*See* Coughlan's case, at 254–55) while ordinary property rights are in general far more limited by considerations of public interest" [*Id.* at para. 34].

197. Barnett, *supra* note 243; Daphne Barak-Erez, *infra* note 243, at 599–600. (arguing that although the cases themselves do not use the term, courts tend to offer more protection when the individual relied on an administrative representation to her detriment than when expectations were disappointed but there was no reliance).

198. Rowland v. Environment Agency [2003] EWCA Civ 1885, THE TIMES, Jan. 20, 2004, 67–68.

> substantive or procedural and the categories of legitimate expectation are not closed. . . Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation. . . . The court must also consider whether and how far (going beyond the immediate parties) the wider interests of the public may be affected by giving effect to the expectation, for the wider interests may require that the public body resiles in order properly to protect those wider interests. . . . At the end of the day the court must decide whether having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public and considerations of proportionality for the public body to resile would in all the circumstances and applying the criteria referred to be so unfair as to constitute an abuse of power.

In other words, the court will protect reliance on a case-by-case basis, reconciling the different interests involved. A recent case, *Bancoult*, demonstrates how those principles can be applied.[199] A 1971 immigration ordinance compulsorily removed the Chagossian inhabitants of islands in the British Indian Ocean Territory so that the main island could be used as a United States military base. The respondent had been successful in an earlier application for judicial review of this ordinance. The government of the United Kingdom stated that it accepted the court's ruling and would not appeal. However, later the government decided that resettlement of the islands was not feasible and that the territory was still wanted for defense purposes. Her Majesty exercised her prerogative to make two Orders in Council to prevent the Chagossians from returning to the islands.

On the issue of legitimate expectation, the House of Lords reiterated the principle that the basis of actionable claims of legitimate expectation is "abuse of power and unfairness to the citizen on the part of a public authority."[200] The House found that there is no abuse of power because the government's statement did not meet the standard of "a clear and unambiguous promise."[201] Taking into

199. *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61.

200. *Id.* at 135.

201. *Id.*

account the context of the statement, there was an ongoing study "on the feasibility of resettling the Ilois" and there was no promise as to how long it would be specifically until the Ilois would be returned to the outer islands. Alternatively, even if a different construction of that statement could be made, the House found sufficient public interest justification for not resettling the Chagossians—the danger and the prohibitive cost of resettlement.

Traditionally, legitimate expectations cannot be created by an unlawful representation or promise.[202] Several prominent administrative law scholars criticized this as overly harsh.[203] Two recent decisions suggest a possible rethinking of this principle. First, in *Stretch*,[204] a claimant purchased a lease from a local authority that obliged him to build a commercial building and gave him the rights to it for 22 years. The lease included an option to renew for 21 years. When it was time to renew the local authority told the claimant that he could not exercise the option because (among other things) its predecessor did not have the legal capacity to grant the option. The court of appeals grudgingly accepted this, stating it was unfair to allow public bodies to use their own error to get out of unlawful bargains they made.[205] The claimant appealed to the European Court of Human Rights, which said that the applicant acquired a legitimate expectation of exercising that option[206], which can be seen as a

202. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 166, at 146–47.

203. PAUL CRAIG, ADMINISTRATIVE LAW 675–80 (Sweet & Maxwell 2003); WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 343 (Oxford University Press. 2004).

204. Stretch v. UK (2004) 38 E.H.R.R. 12.

205. Stretch v. West Dorset District Council, [1999] 77 P.P. & C.R. 342: "... I would dismiss this appeal. I do so with little satisfaction. It seems to me unjust that when public bodies misconstrue their own powers to enter into commercial transactions with unsuspecting members of the public, those bodies should be allowed to take advantage of their own errors to escape from the unlawful bargains which they have made. For a local authority to assert the illegality of its own action is an unattractive stance for it to adopt. It is the more striking when, as in this case, the transaction in question is as mundane as a building lease; and the local authority, by taking the point against the member of the public with whom it or its predecessor contracted, thereby robs that member of the public of part of the consideration for entering into the lease. ..."). and see also Mark Elliott, *Legitimate Expectations and Unlawful Representations*, 63 C.L.J. 261(2004).

206. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

property right under Article 1, Protocol 1 of the European Convention of Human Rights.[207]

In a subsequent case, the court considered how *Stretch* affects domestic English Law.[208] In 1968 Mr. and Mrs. Rowlands bought a country house bordering a stretch of the River Thames, Hedsor Water. Public rights of navigation exist over the River Thames "from times immemorial."[209] However, for over 100 years the authorities treated Hedsor Water as private, creating barriers to entries and putting signs that it was private. In 2001, the Environmental Agency reviewed its position and decided that Hedsor Water was still public, and that the agency had no authority to make it private. However, in consideration of the Rowlands' rights it promised not to publish or put up notices stating that Hedsor Water was a public body of water. Mrs. Rowland, now a widow, appealed, claiming her legitimate expectations were frustrated. The court concluded that under domestic law, it could not uphold a legitimate expectation based on an unlawful promise, although with substantial reluctance from at least one of the justices, Justice May.[210]

However, Lord Justice Gibson also addressed the effect of *Stretch* and the convention, and concluded that under the European Convention of Human Rights, a legitimate expectation can arise, even if the public body that created the expectation acted ultra vires. The doctrine cannot entitle the party to enforcement of something that is ultra vires but entitles it to other relief—"benevolent exercise of a discretion available to alleviate the injustice or payment of compensation."[211] Illegality will affect the balancing of the expectation with the private right; though it may, in some circumstances, support non-enforcement.[212] In applying these

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and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

207. *Stretch v. UK* (2004) 38 E.H.R.R. 12. Para. 32—35.

208. *Rowland v. Environment Agency* [2003] EWCA Civ 1885, THE TIMES, Jan. 20, 2004.

209. *Id.* at para. 3.

210. *See id,* L.J. Gibson, para. 81; L.J. May, para. 114—122.

211. *Id.* at para. 85—90.

212. *Id.*

principles to the specific facts of the case, L.J. Gibson concluded the agency here acted proportionally and minimized the harm to the private interests and that the public interest was too strong to put aside.[213] What this suggests is that in cases where the behavior of the agency affects property, under the European Convention of Human Rights, even unlawful representations which create legitimate expectations must be considered. In the face of anything less than clear illegality, the doctrine of legitimate expectations, as described above, can protect a citizen's reliance.

On the other hand, courts generally do not see damages as an appropriate response to unlawful decisions, and tort liability has been substantially narrowed. Unlawfulness does not in itself create a right to damages and another tort must be acknowledged. Possible torts are usually breach of statutory duty, negligence, and misfeasance in public office—and all three are hard to prove in this context.[214] All three are limited in terms of who can sue and which kind of damages can be granted, usually property damages and personal injury are covered, but not economic loss and lost profits—very relevant to cases of revoked licenses or welfare benefits.[215]

The reasons for limiting liability are usually that courts are worried liability will have a chilling effect on officials, leading to a flood of litigation, that the courts are not able to properly evaluate the hard administrative decisions, and that allowing damages for economic loss will make liability potentially limitless and strain public resources and that damages will erode more appropriate administrative remedies.[216]

In relation to misrepresentations specifically, negligence liability was narrowly established in the classic case of *Hedley Bryne v. Heller*.[217] The case established that anyone who makes an incorrect statement of fact, law, or intent is liable for damage—including pure

213. *Id*, at para. 96.

214. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 182—92.

215. *Id.*

216. *Id.* at 183.

217. *Hedley Bryne v Heller* [1964] A.C. 465 (H.L.). Reconfirmed in Williams v. Natural Life Health Food Ltd [1998] 1 WLR (H.L.) 30; *see also*, SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 218—219.

economic loss—of a recipient of that statement if:[218]

a. Representor willfully assumed responsibility for its correctness, according to the court's objective assessment (subjective state of mind not determinative).
b. Recipient acted in reasonable reliance.
c. Representor knew the statement would be communicated to and acted upon, by the recipient for a specific purpose.

Why the representor made an error is irrelevant.

Public authorities are subject to the principle, but it is limited to special situations because the cases applying *Hedley Bryne* are influenced by the policy considerations which led to restriction of negligent liability here; the courts are reluctant to impose liability since they are worried it will adversely affect the exercise of public powers, cause a flood of claims, and erode alternative remedies.[219]

Can this be applied to the United States? Aside from the usual concerns about learning from another country, the U.K. has a parliamentary system, so separation of powers operates differently. The U.K. is a unitary country, and is more centralized than the United States. However, as explained in section II, the strongest reason raised by the Supreme Court for denying estoppel is the concern about allowing executive officials to deviate from commands of the legislature or allowing those officials scope to abuse their power. Those considerations are raised and addressed by the legitimate expectations of jurisprudence directly.

B. Israel

Israel offers limited protection of reliance on government representations using several tools. First, Israeli law directly protects reliance on an administrative promise in certain narrow circumstances and uses an acknowledged doctrine of estoppel in others. Second, Israeli law acknowledges a tort remedy for misrepresentation. Third, through the doctrine of "proportional invalidation," it allows defective, or faulty, administrative decisions to stand in certain cases by acknowledging the problem but setting a different remedy than invalidation.

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218. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120 at 218.

219. *Id.* at 219.

Israeli law acknowledges an "administrative promise" that binds the agency in certain, narrow circumstances. If an administrative agency made a promise on a matter within its legal authority, with the intent to give it binding legal force, and the agency has the power to fulfill the promise, the agency is bound by the promise—unless there is a legal justification to retreat from it.[220] The requirements of this doctrine are narrowly construed and closely scrutinized,[221] and even if the first three conditions are fulfilled, an authority can still retract its promise if there is a good justification—for example, a deviation from general policy or a violation of the principle of equality.[222] This suggests very limited protection of reliance, but is not the whole picture.

The protection of reliance on a decision that is outside the agency's authority is even more limited. The vehicle used here is estoppel, and estoppel against the government has rarely been acknowledged in Israeli law.[223] After many years of denying it completely, the Supreme Court acknowledged estoppel in principle in 1999. The Court addressed whether the Israeli Land Administration could retreat from an agreement to provide lands without tender to a plaintiff in certain conditions.[224] The presiding Justice in the case acknowledged estoppel in narrow circumstances and created a balancing test. He balanced the public interest and the gravity of the harm to the public interest from enforcing an illegal decision with the harm to the individual from overturning the

220. Alex Stein, *Administrative Promise*, 14 MISHPATIM 255, 258—265 (1984-1985); Case no. 135/75 Sai-Tex v. Minister of Commerce and Industry, P.D. 30 673, 676; 594/78 Oman Knitting v. Minister of Industry, Commerce and Tourism, P.D. 32 (3) 469, 474 (1978); 142/86 Dishon v. Minister of Agriculture, P.D. 40 (4) 523, 529. These requirements were reaffirmed in 714/06 Major Amir Ziv v. IDF (Not published, decision on December 30, 2007).

221. *See* Yoav Dotan, *An Administrative Promise to the Public*, 5 MISHPAT UMUMSHAL (Law and Government) (2000) 117—63 (Hebrew) (demonstrating that the cases in which the Israeli Supreme Court accepted a claim of administrative promise have been very few).

222. *Id.* at 491; *see also Id.* at 492 (criticizing that approach).

223. Barak-Erez, *supra* note 106, at 153—55.

224. 6996/97 Aba'ada Ltd. v. The Planning and Development Department, Israeli Land Administration, 53(4) PD 117, 123—124 [1999](Isr.).

decision.[225] The Justice also decreed that if the harm to the public interest was too high, then an alternative remedy to enforcement should be considered—either an alternative remedy close to the initial representation or monetary damages.[226] In that specific case the Justice believed that given the importance of awarding public lands only through tender, the public harm from enforcing the administrative representation—that lands would be awarded without tender—was too high, and therefore remanded to a lower court for the consideration of an alternative remedy.[227] This grudging acceptance of estoppel was repeated in a later case,[228] though that case highlighted the hesitation of using administrative estoppel.[229]

Israeli law potentially provides stronger remedies. First, Israel allows tort damages for negligent misrepresentation by public officials.[230] This liability was used in the zoning and construction field in cases involving faulty permits or faulty promises.[231] In fact, Daphne Barak-Erez, a Supreme Court Justice and a prominent scholar, strongly advocates damages as the preferable remedy, compared to an injunction, in most circumstances:

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225. *Id.* 124. *See also* Barak-Erez, supra note 160, footnote 209, at 155.

226. *Id. at* 125.

227. *Id.* at 125.

228. 9634/08 Hof Hasharon Regional Council v. Minister of Interior, Dinim Elyon 87 192[2009] (Isr.). In that case a local authority wanted to appoint a salaried vice-chair. The law requires a municipality to have a minimum of 10,000 inhabitants, and the official census did not reflect that; the municipality claimed it did in fact have more than 10000 people, and that it met with a Ministry of Interior official that promised that one the census reflected 10,000 people, it can appoint a salaried vice-chair. The municipality worked hard to correct the census, but it's request was nonetheless denied due to a subsequent Supreme Court case. http://elyon1.court.gov.il/files/08/340/096/b07/08096340.b07.pdf. The court rejected the municipality's main claim, that the previous Supreme Court case was not relevant, and also rejected its estoppel claim, concluding that in balance, the interest against enforcement of the representation were stronger here.

229. *Id.*

230. Barak-Erez, *supra* note 160, at 156 n.210.

231. 86/76 "Amidar", the National Corporation for Housing Immigrants in Israel v. Avraham Aharon; 209/85 Kiryat Ata City Council v. Ilanko LTD. (acknowledging the principle that an authority must pay damages for negligent misrepresentation, but not applying there because of proof issues); 1540/97 Local Zoning and Construction Committee, Holon v. Avraham Rubinstein and partners, Construction company LTD, P.d. 57 (3) 374 (2003).

> reliance damages to the injured individual can correct the injustice without enforcing an ultra vires decision . . . the monetary remedy also corrects the injustice to the party in question without harming third parties (who would suffer the externalities of enforcing an illegal decision). Other advantages are internalization of the damage by the agency, deterrence from negligent violations in future, and spreading the harm (across all tax-payers). Another important advantage is the ability to match damages to the extent of the harm (since damages match the reliance, while enforcement may provide higher benefits than just the reliance).[232]

Similarly, Israeli administrative law acknowledges a doctrine of "relative voidness."[233] Under this doctrine, in appropriate cases where justice demands it, an administrative action will not be void, and may even have some validity. While in many of the early cases the doctrine was applied against the citizen, to preserve actions done without sufficient notice or hearings from being voided, often with harsh results towards the citizen,[234] that is not the only way it was used. For example, in *Beit Herkev*,[235] the court used relative voidness to assess the competing interests of a public body and a private firm and arrive at a compromise solution.[236] In the case, the City of Jerusalem's behavior suggested to a company operating a parking garage that it may deduct expenses from its rent, although the municipality had no legal authority to do that.[237] The court decided that given the fault of both parties, the correct result is not to completely invalidate the contract but to reduce the rent owed to the city to make up for the deducted expenses.[238]

The principle of relative voidness was criticized from both

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232. Barak-Erez, *supra* note 160, at 156; The circumstances where injunction will be better is when the reliance is so great the damages will harm the public interest by bankrupting the authority. *Id.* at 156–57 n. 214.

233. Barak-Erez, *supra* note 160, at 29; Daphne Barak-Erez, *Relative Voidness and Judicial Discretion*, 24 MISHPATIM 519, 520–21 (1995) [hereinafter Barak-Erez, *Relative Voidness*]; Yoav Dotan, *Instead of Relative Voidness*, 23 MISHPATIM (HEBREW UNIVERSITY LAW REVIEW) 587, 630–33 (1993) (Hebrew) [hereinafter Dotan].

234. Barak-Erez, *Relative Voidness* at 24; *See id.* at 519, 529, 531–533 (1995).

235. 6705/04 Beit Herkev LTD v. the City of Jerusalem, *available at:* http://elyon1.court.gov.il/files/04/050/067/c10/04067050.c10.htm. Last visited June 6, 2013.

236. *Id.* at ¶ 26–38.

237. *Id.* at ¶ 3–22

238. *Id.* at ¶ 77.

directions—for being too formalistic and not allowing the court to do justice,[239] and for subjecting the authority of public agencies to judicial discretion to an extensive degree and violating separation of powers, e.g. by Barak-Erez.[240] More specifically, Barak-Erez distinguishes between two meanings of relative voidness. The first meaning is procedural: a claim of voidness of administrative action can only be heard if made "by the right party, in the right case."[241] This sounds a lot like estoppel: the action may be void, but the voidness cannot be raised in certain circumstances. That, in Barak-Erez' view, is relatively uncontroversial and not problematic. The other meaning—the one Barak-Erez criticizes—is a discretionary meaning: under this meaning, relative voidness gives the court discretion to waive voidness—to uphold the administrative action—if it thinks it is just to do so.[242]

C. *France*

French law distinguishes between representations and actual decisions. France protects public reliance on actual decisions via the principle of irrevocability of administrative decisions that create rights (intangibilité des decisions créatrices de droits).[243] The principle is based upon the idea that some administrative decisions, government contracts, or even laws create a "vested right" (droit acquis) in the person seeking to act. A vested right can only be revoked under certain circumstances, especially those with an aim to uphold legal certainty and a legitimate public expectation.[244] To illustrate how a vested right operates, we can use the example of citizenship. Citizenship can be granted when the birth occurs in France and the parents are themselves born in France ("jus soli")[245] or

239. Dotan, *supra* note 234, at 639.

240. Barak-Erez, *Relative Voidness*, *supra* note 234, at 519, 538—542.

241. *Id.* at 527—529, 537. (regarding the claim that this meaning is natural and not problematic).

242. *Id.* at 531—542.

243. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 70.

244. *Id.* at 92.

245. *See* Du Ministère des Affaires Etrangères, http://www.diplomatie.gouv.fr/fr/francais-a-l-etranger-1296/vos-droits-et-demarches/nationalite-francaise/.

through a procedure of naturalization.[246] The loss of the French nationality can be voluntary (express declaration of the person seeking to give up this vested right after obtaining another nationality[247]) but this vested right can also be lost involuntarily by a person who is not French by birth or by descent. There is a revocation, or withdrawal, of nationality ("déchéance de nationalité") when the person has committed certain types of violations as terrorism or crime against the fundamental interests of the Nation.[248] But the right can only be revoked if the person obtained the nationality during the ten years before revocation[249] and the withdrawal of nationality must happen within the 10 years after the commission of the crime. All these conditions demonstrate how difficult it is to revoke a vested right—even if there are strong public considerations in support of such revocation.

Under French law, the revocability of government decisions rests heavily upon the government's assessment of whether the decision created a vested right in the person seeking to act. There is no bright line rule as to which types of decisions are "rights bearing" and which types of decisions are not, but the distinction—and the type of right she possesses—is obviously very important to the relying citizen. Therefore, this is an area of substantial uncertainty.[250] For example, a decision that was the result of an agency's consent to waive a requirement or not insist on return of money can still create a right.[251] Similarly, in one case an agency exercised its discretion and issued a permit for opening a factory. The Conseil d'etat decided that "malgré son caractère purement gracieux," although this decision was discretionary and the agency was not, in the circumstances, required to make it, it did create vested rights.[252]

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246. L'acte Createur De Droits, Notion Symptomatique do L'existentialisme Juridique. Du Juge Administratif Francais (2003), http://alexandrecoque-avocat.fr/la%20notion%20d'actes%20cr%E9ateurs.pdf.

247. Article 23, Code Civil (1993).

248. Article 25, Code Civil (1994).

249. Article 26, Code Civil (2013).

250. *Id.*

251. CE Sect., Oct. 24, 2001, Min. éco., fin. et ind. c/ Poussin: Juris-Data n° 2001-063245 ; Dr. adm. 2002, comm. 33, obs. C. M.

252. CE Sect., Mar. 3 1967, Min. constr. c/ Sté Behr Manning et Sté des abrasifs Norton : Rec. CE 1967, p. 105 ; AJDA 1967, p. 348 et 528, obs. Liet-Veaux et concl.

In addition, French law has an exception for unlawful declaratory decisions. Where a specific result is required under clear legal provisions, an agency decision deviating from that result is revocable at any time.[253] This is in contrast to constitutive decisions, where the government has discretion.[254] Even if the constitutive decision was unlawful, French law allows for revocation if, and only if, the initial government act/decision becomes subject to review within the first two months of its entrance into the public sphere.[255] That means in practice, the government cannot revoke a decision—even if it is illegal—unless it did so within the first two months of review.[256] The rationale is that there needs to be a balance between the principle of lawful government and the legitimate expectations of the citizen.[257] Concluding that the power to revoke is a reflection of the power of an administrative judge to annul unlawful decisions, the court analogized to judicial review, and applied the same time limit allowed for seeking judicial review—in France, a very short time.[258] Today the time limit for third parties starts at publication.[259] In the rare case that a decision has not completely been disclosed to the public (following French procedures of notification and publication) or to the beneficiary of a government act, revocation is allowed within

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Fournier ; JCP G 1967, II, 15082, note Liet-Veaux.

253. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 95.

254. Dupuis , G., *Droit administratif* 500 (Paris: Sirey, 11th ed. 2009); *see also*, SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 93—94.

255. *Id.*

256. *Id.* at 95.

257. Pécresse conclusions CE Sect., Oct. 24, 1997, Laubier RFDA 1998, 528; *See also*, SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 92.

258. *Id.* at 93;. Dupuis , G. *Droit administratif* 500 (11th ed., 2009).

259. Code de Justice Administrative, Article R421-1 (2004): "Sauf en matière de travaux publics, la juridiction ne peut être saisie que par voie de recours formé contre une décision, et ce, dans les deux mois à partir de la notification ou de la publication de la décision attaquée.La publication, sous forme électronique, au Journal officiel de la République française fait courir le délai du recours ouvert aux tiers contre les décisions individuelles ...4° Emanant d'autorités administratives indépendantes ou d'autorités publiques indépendantes dotées de la personnalité morale." Article R421-2 "Sauf disposition législative ou réglementaire contraire, le silence gardé pendant plus de deux mois sur une réclamation par l'autorité compétente vaut décision de rejet."

four months of the date that the decision was made.[260]

While decisions create rights, informal representations do not. Representations are "legally relevant facts" (faits juridiques) rather than "legal acts" (actes administratifs), and thus are not subject to the principle of irrevocability. The administration may, therefore, go back on informal representations, though it may be required to compensate for loss caused by reliance on such representations.[261] For example, in the *Bouveret* case,[262] the applicant was offered a position in a letter signed by the mayor of a French town, following a job competition. When he resigned from his current position, the mayor refused to confirm the appointment, and the Conseil d'Etat decreed that the applicant cannot challenge the refusal—though the local authority was liable in damages.[263] Applicants tried to draw on the principle of legitimate expectations in several cases, but the Conseil d'Etat rejected that attempt.[264] The only exception to this is that since European Community Law (EC Law) does acknowledge a principle of legitimate expectation, in cases implementing provisions of EC law—which are not uncommon—the French courts will apply the principle.[265]

This principle is even more strongly stated in relation to unlawful representations. Unlawful representations are not binding and can neither give rise to an estoppel by representation nor a legitimate expectation.[266] This is true even if the administration made a very precise and unqualified assurance. For example, in the case of Société des huileries de Chauny,[267] the Minister of Finance gave a written assurance to French oil traders that a price regulation would

260. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 7.

261. *Id.* at 114.

262. CE 18/10-57 Bouveret Rec 542; *See also*, SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 115.

263. *Id.*

264. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 115—16;; CE 5/3-99 Rouquette RFDA 1999, 370. This was also approved by the Conseil Constitutionel—CC 30/12-96, no 96-385, Receuil CC 141.

265. CE 5/3-99 Rouquette RFDA 1999, 370.

266. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120 at 146—147.

267. CE *24/4-64 Société des huileries de Chauny, Rec 249; see also*, SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 147.

remain in force. The Conseil d'Etat found that that assurance illegally fettered the Minister's discretionary power to regulate prices, and was thus unlawful—and the Minister could not be bound by it.

This is also true in European Community Law. For example, in *Pauvert*,[268] the applicant was offered a job as a chauffeur—in writing, after an interview. But the vacancy notice specified that the job required fifteen years of experience as a chauffeur—and while the applicant did have fifteen years of experience—only ten of them were as a chauffeur. This meant the Court of Auditors was not bound by its job offer. This case may not close the matter for informal representations, though, since the ECJ stated in its opinion that the applicant had no legitimate expectation since he should have known the length and nature of his work experience, and thus should have known that he does not satisfy the legal criteria.[269] While this appears to give no protection to individuals relying on informal representations, and creates some risk for those relying on decisions, the picture is incomplete, since individuals relying on both decisions and representation are very likely to have a damages remedy available.

Again, there is a distinction between decisions and informal representations. In relation to decisions, unlawfulness is by definition a service fault (faute de service) which can make the administration liable in damages.[270] Unlike the law in the United States[271] or the U.K.,[272] a duty of care by the administration to citizens is assumed—it is the administration's duty to administer competently. Two principles of French administrative law support a damage remedy to the individual. First, under the principle of liability of risk (theorie de risqué),[273] if a risk is caused by a dangerous activity the administration is engaged in for the public interest, and causes abnormal harm to certain individuals, the loss should be shouldered by society (spreading the cost) through a damage award. Second, under the principle of a breach of equality before public

268. Case 228/84, Pauvert v. Ct. of Auditors, E.C.R. 1969 (1985).

269. *Id.*

270. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 171.

271. *In re Kinsman Transit Co.*, 388 F.2d 821, 825 (2d Cir. 1968).

272. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 171.

273. CE 28/3-19 Regnault-Desroziers RDP 1919, 239

burdens (égalité devant les charges publiques)[274] any decision that is in the public interest that causes abnormal harm to a limited class of people must be followed by compensation. The compensation under either principle is provided under a no-fault standard.[275]

In relation to informal representations, it is accepted that the administration can be liable for loss caused by misrepresentation of its officers.[276] An incorrect representation of fact, law or intent relied upon by someone acting with no fault of their own makes the administration prima facie liable.[277] For example, in the case of *Aubin*,[278] Mr. Aubin was advised by French authorities to apply for unemployment benefits in Belgium, even though he was not entitled to them. Registration there precluded him from registering for such benefits in France. The Conseil d'Etat held that the French authorities were liable for Mr. Aubin's loss, even though the information was part of a general advisory service and the correct interpretation of the Belgian and European Community rules was not clear.

Where the administration wants to change a representation that was not an error, damages are less broadly provided for. French law allows the administration to change such a representation, as noted above, and does impose liability under the doctrine of breach of non-contractual promise.[279] However, liability is limited. First, the administration has to make a clear and unqualified statement of intent—a promise—beyond consultations and preparations.[280] Second, the courts balance the citizen's reliance with the public interest that led the administration to go back on the representation, and the damages will be reduced—or not awarded—if there were compelling reasons for the change.[281]

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274. CE Sect., Nov. 30, 1923, Rec. Couiteas 789.

275. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 172.

276. CE Sect., July 5, 1949, Aubery Rec 37; CE Sect. Dec. 21, 1950, Feiz Karam Rec 612 ; CE Oct. 18, 1957, Bouveret Rec 542 ; CE Sect.une, 25, 1954, Otto Rec 380 ; SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 220.

277. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 220.

278. CE Sect. Jan. 20, 1988, Aubin RDP 903.

279. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 224.

280. TA Paris 14/10-97 Société Batignolle DA 1998 no. 118; SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 224.

281. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 225.

Causation and remoteness requirements may limit the extent of damages for both decisions and representations. Especially in relation to unlawful decisions or representations—often the unlawfulness itself leads to dismissal, under the assumption that even without the unlawfulness, the plaintiff would not get what they asked for. This is especially true if the unlawfulness was procedural.[282] In *Dame Deux*, the national medical insurance refused to reimburse certain medical procedures without a hearing. The damages claim failed because the owner did not comply with legal requirements and would not have gotten reimbursement because of that, regardless of a hearing, according to the Conseil d'Etat.[283]

The *Caladou* case is an example of informal representation.[284] In *Caladou*, the plaintiff received incorrect information about a time limit and therefore lost his opportunity to apply for war damage compensation. The Conseil d'Etat assessed his claim and found that it would probably not have met the legal requirements for providing the compensation. Therefore, the incorrect advice caused no loss, and the administration was not actually liable.[285] The causation requirement limits compensation on a case-by-case basis, but the principle still stands: the injured citizen can appeal and try and prove her damages.

D. Comparison

What the previous sections suggest is that while all three countries offer some protection for reliance, none of them offers it in every case—it is a case-by-case analysis in each country. All countries provide much less protection, if any, to clearly unlawful representations. All of them consider both the harm to the individual and the harm to the public interest. Also, France, Israel and to a lesser extent, England, provide a monetary damage remedy.

There are substantial differences in the political and legal structure and features of the three countries. Specifically, the United States is a federal country, while the U.K., France and Israel are unitary. This could affect the ability of the center to control the local

282. *Id.* at 200–201.

283. CE Sect. Jan. 20, 1988, Aubin RDP 903.

284. CE Sect. Nov. 18, 1960, Caladou AJDA 190.

285. SCHØNBERG, LEGITIMATE EXPECTATIONS, *supra* note 120, at 231.

units, and give more weight to the needs of the center to control others by not making the representations of local offices binding. This issue has been addressed in some detail in section II.C., but while collusion between a local office and a regulated party is not impossible, my conclusion is that the concern is not sufficient to justify a hard line on estoppel in the United States. To repeat the main points raised, it is unlikely that the possibility of estoppel will be what determines local disobedience, because if collusion is discovered, that is the justification to overturn the decision. In addition, the decision is not a way to overturn a general rule, since it is unlikely to govern future cases because an error is an appropriate reason for an agency to decide other cases differently; and even a repeated error would only bind the agency in narrow circumstances under current jurisprudence. I would add that agency centers have other mechanisms to control lower offices that are more direct. Finally, even if a doctrine of estoppel could encourage subversion by a local office, that would need to be balanced with the more common scenario where there is just an error on the part of the local office, and the harm to the citizen is from that error.

Another difference is that the United States is a presidential system; the U.K. and Israel are both parliamentary, with a different model of separation of powers, and France is semi-presidential and has unique features. It is not clear, however, as explained in section II, that this difference affects the basic problem. In most cases, the worst tension is between the framework provided for by a democratic legislature and representations offered by the executive branch, which is mostly a professional bureaucracy. In a parliamentary system, the political executive is part of the legislature, the executive branch is mostly civil servants and the process for statutory changes still has to be followed. In both parliamentary and non-parliamentary systems, civil servants do not have the authority to deviate from statutes independently; and value is placed on citizen reliance, trust in government, and administrative efficiency. The dilemma seems similar enough for the solutions developed in other, admittedly different, systems to be applicable to the United States.

IV. Solutions to the Dilemma

Combining the analysis of the arguments on both sides with the

comparative analysis suggests that while the concerns about the rule of law are real enough, there are competing interests. Harm to the individual's interests, as well as harm to individual autonomy, and even to the functioning of the public administration, support protection of reliance in certain cases. The countervailing concerns, however, do not support automatic or constant protection, at least not if done through enforcement.

This section addresses two potential solutions to the problem, solutions that can operate simultaneously and cover different situations. The first is direct enforcement of the decision relied upon. In that, I am breaking no new ground, aside from the previous discussion of the considerations behind the decision: I am recommending Schwartz's excellent proposal, though I am qualifying it. In the second part, I recommend a monetary remedy and suggest both a judicial way to arrive there and a potential legislative change.

A. Providing for Direct Enforcement in Appropriate Cases

In his article, Schwartz[286] builds on existing doctrines of administrative law to allow limited, case-by-case reliance in appropriate cases. He suggests a two-way process the court should use. Under Schwartz's two-stage approach, the first stage will draw on the Supreme Court's approach in *Lyng v. Payne*.[287] Schwartz suggests that in all estoppel cases the plaintiff will first be required to explain the problem to the agency and request a remedy. If there is a statute, regulation or other policy, the plaintiff should request a waiver of those policies.[288] If the agency refuses the waiver, the plaintiff can then appeal, and the agency's decision to refuse the waiver will be examined under the Administrative Procedures Act's standard for judicial review, under which agency action may be set aside if it's "arbitrary, capricious, an abuse of discretion."[289]

In examining the agency's decision, the court will consider whether the agency had authority to grant the waiver, and "the

286. Schwartz, *supra* note 5, at 698.

287. *Lyng v. Payne*, 476 U.S. 926 (1986).

288. Schwartz, *supra* note 5, at 698.

289. Administrative Procedure Act, 5 U.S.C.S. §706(2)(A) (2014); Schwartz, *supra* note 5, at 698.

relationship between the legislative regulation that the agency allegedly has violated, together with its purposes, and the body of law, application of which is sought to be estopped, along with its policies. The impact of the estoppel remedy on the policies underlying the latter body of law must be considered as well as the availability and adequacy of alternative non-estoppel remedies. The ultimate inquiry is whether it is reasonable for the agency to insist on strict enforcement of the particular pieces of law it favors, in the face of its own particular lawless conduct."[290] This allows the court to focus on the heart of the matter: should reliance be protected, when comparing the harm to the individual with the harm to the public interest from enforcement? Can the agency's decision be supported? It does, however, subject the doctrine to all the problems surrounding the arbitrary and capricious standard.

Courts' interpretation of the arbitrary and capricious standard has been riddled with internal contradictions since the Supreme Court in *Overton Park*[291] said: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Is the standard, therefore, searching or narrow? Scholars disagree on how to interpret the standard.[292] Some emphasize the need for close review of agency action,[293] while others highlight the problems it causes to agency operation, including ossifying agency action, giving interest groups a tool to sabotage decision making, and forcing agencies to focus on potential litigation rather than substance.[294] Despite the disagreements, the statutory standard of review, "arbitrary and capricious," is flexible and hence

290. Schwartz, *supra* note 5, at 698–99.

291. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, (1971).

292. THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND ADMINISTRATION 158-60 (Praegers Publishers 1993); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 T. L. Rev. 483, 514 (1997); Patricia M. Wald, *Making Informed Decisions on the District of Columbia Circuit*, 50 Geo. Wash. L. Rev. 135, 138 (1982); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1382 (1991-1992) [hereinafter McGarity Some Thoughts].

293. Seidenfeld, *supra* note 295, at 524.

294. McGarity, *Some Thoughts*, *supra* note 295, at 1419, 1451–1453.

suitable in this context.

Schwartz' second stage applies to a small subset of cases characterized by harm to an important liberty or property interest and really unfair government behavior and a situation where the only way to cure a deprivation of due process is estoppel, he suggests application of a test of "remedial due process, based on *Mathews v. Eldridge*."[295] This test would allow the court to balance the private interest with the government interest, and arrive at an appropriate result, taking all considerations into account.[296] His approach has the advantage of using tools courts are already familiar with, allowing for flexibility, building in considerations of the public interest, and increasing protection of reliance. It is reasonably clear yet flexible, allowing case-by-case assessment. It also takes into consideration the rule of law. It has the disadvantages of probably creating room for more litigation (it's hard to predict whether there will, in fact, be more litigation as a result of this), reducing clarity by using a vague standard, and is vulnerable to the arguments raised against the hard look doctrine elsewhere.

B. A Monetary Remedy

In at least two situations, direct enforcement will be inappropriate, but there may still be good reasons to provide some remedy. One situation is where the agency's representation is in direct contradiction to a statute. In that scenario, as we have seen, no system offers direct, unconditional enforcement because the concerns about legality and separation of powers are strongest. The other situation is where the balance of considerations does not support direct enforcement, but the citizen will be unfairly harmed without a remedy. The example of the plant in the beginning of this paper is one of those: The plant sought to comply with the law, asked the EPA for instructions on how to do that, invested money, and now is facing potential denial of permit. Denying the permit because of erroneous government advice, causing financial loss, seems unfair. On the other hand, allowing the plant to pollute water, and harming the environment and potentially harming the health of humans and other life forms is also problematic. One way out of the dilemma is to

295. Schwartz, *supra* note 5, at 739–40.

296. *Id.* at 740–41.

provide a monetary remedy in those situations, tailored to the specific harms to the individual.

Is there a legal tool to do so? This paper suggests two legal paths: an extension of Takings doctrine, following what the Court did in *Ruckleshaus v. Monsanto*,[297] and a legislated remedy.

1. *Extending Takings*

An interesting line of cases related to takings may suggest a judicial solution, even though context and area are different. The Fifth Amendment reads: "private property [shall not] be taken for public use, without just compensation."[298] This has been interpreted as preventing government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[.]"[299] This question is handled on a case by case basis.[300] The courts identified three factors of particular significance: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[301]

In *Monsanto*, the Court applied this doctrine to a situation that sounds a lot like the estoppel cases discussed here. At issue, were certain health, safety, and environmental data the Monsanto Company had submitted to the EPA.[302] Monsanto considered these data trade secrets, but willingly submitted them to the EPA as part of the process to register new pesticides.[303] This process was governed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[304] FIFRA was originally concerned with the licensing of labeling of statutes, thus its original incarnation was silent on the use and disclosure of health and safety data.[305] In 1972, FIFRA was updated in a way that prevented EPA from publicly disclosing any data that was considered a "trade secret" and also limited EPA's ability to use

297. *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

298. U.S. Const. amend. V.

299. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

300. *Id. at* 124.

301. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

302. Monsanto, 467 U.S. at 998.

303. *Id.* at 998, 1004.

304. 7 U.S.C. chapter 6 (s. 136 and on).

305. Monsanto, 467 U.S. at 991, 1008.

one applicant's health, safety, and environmental data in considering a subsequent application if that data were designated a "trade secret."[306] What a "Trade secret" was was never defined, and the EPA interpreted the term as limited to formulae and manufacturing processes, whereas applicant firms argued that "trade secrets" should include health, safety, and environmental data. Several court decisions supported the position taken by the applicant firms.[307] In 1978, Congress amended FIFRA to resolve this dispute, allowing EPA to use most health, safety, and environmental data submitted after the date the statute became effective in considering other applications, provided the new applicant offered some compensation to the original submitter.[308] The amendment also allowed EPA to disclose as much of this data to the general public as necessary.[309]

Monsanto argued that these new provisions were an unconstitutional taking under the Fifth Amendment. It had spent over $23.6 million to develop the health, safety, and environmental data for its application.[310] The company considered the health, safety, and environmental data to be trade secrets. The value of the data would be destroyed by any public disclosure.[311] The district court agreed and concluded that allowing the EPA to consider Monsanto's data when evaluating other applicants would "give Monsanto's competitors a free ride at Monsanto's expense."[312]

The analysis centered on the third *Penn Central* factor of "reasonable investment-backed expectation" because the Court found that the force of this factor was so overwhelming as to be dispositive.[313] The Court split the decision into pre 1972, 1972-1978 and post 1978 periods, but our focus is on the 1972-1978 period. For this period, the 1972 amendments allowed companies to protect data from disclosure by designating them as trade secrets and prohibited

306. *Id.* at 992.
307. *Id.* at 993.
308. *Id.* at 993–94.
309. *Id.* at 1006.
310. *Id.* at 998.
311. *Id.* at 999.
312. *Id.* (citations omitted).
313. *Id.* at 1005.

the EPA to disclose such data.[314] Thus, "the Federal Government had explicitly guaranteed to Monsanto . . . an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." If the EPA were to either disclose or consider data submitted during this period designated as trade secrets, the agency would "frustrate Monsanto's reasonable investment-backed expectation[s.]"[315]

There are a few issues to highlight here. First, the guarantee here was in a statute, as is true for Monsanto's progeny.[316] However, that does not mean we cannot extrapolate from this line to administrative actions, even those in violation of statute. After all, the constitution governs administrative actions as well as statutes. This line of cases offers a case-by-case method to examine whether a monetary remedy is appropriate. As explained below, the remedy can be tailored to take into consideration the public interest. It also helps solve the Court's dilemma in *Richmond*. If the Court is concerned about the Appropriation Clause, then it may not be allowed to provide direct monetary disbursement without congressional authorization, but may be allowed to compensate justifiable reliance based on another Constitutional clause—the Fifth Amendment.

Second, the Monsanto Court itself emphasized the element of reasonable, investment-backed expectation. That element is not always met, however. In Jane's case, for example, when Jane was applying for benefits, she did not have any relevant investments. The Court in Monsanto did not define what reasonable, investment-backed expectation means.[317] It did mention Monsanto's expenses and the value of the data to Monsanto when describing the data.[318] In *Nollan*,[319] a case examining a permit to build a larger residence on the

314. *Id.* at 1011.

315. *Id.*

316. Which will be discussed in the next paragraphs.

317. The Court simply stated that, "the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* at 1011.

318. *Id.* at 998.

319. Nolan v. California Coastal Commission, 483 U.S. 825 (1987).

land, the government granted the permit conditional on an easement, but the Court did not seem to demand previous investment, focusing instead on the Nolans' right to build on their property—in contrast to Monsanto's request of registering an insecticide.[320] The third circuit in Tri-Bio Laboratories upheld the FDA's decision refusing to allow a company to use the health and safety data submitted by the original manufacturer to support its generic drug application, on the grounds that it would be considered a taking. The court did not expressly emphasize investment, but instead emphasized the manufacturer's property interest in the data.[321] In short, the courts following *Monsanto* seemed to emphasize the strength of the private interest (as in *Nolan*) or of the reliance, rather than the need for investment per se. This means it can be applied to the situations discussed here.

The last point is whether the doctrine allows consideration of the public interest. Although that was not the focus of the cases, the public interest seems embedded in the court's analysis of the extent, though not the existence, of the taking. Courts vary in their balancing, but all seem to consider the public interest to some degree. The variation in the effect is not surprising given the court's acknowledgment that the inquiry on takings is very much "ad hoc, factual."[322] For example, the court in *Monsanto* notes that sharing the data is important for the EPA and for public good and restricting *Penn Central* from building on top of the train station protects a historical landmark.[323] On the other hand, an easement granted for public to access a beach is not enough of a public interest and the court in *Nolan* seemed to give the interest less weight.[324] Similarly, the Third Circuit in *Tri-Bio Laboratories*[325] and the First Circuit in *Phillip Morris* found that governmental agencies could not share the data from the corporations without compensation—regardless of the obvious good for public health and safety.[326]

The conclusion I suggest is that courts expressly extend the

320. *Id.* at. 833.

321. *Tri-Bio Laboratories, Inc. v. United States*, 836 F.2d 135, 137, 141 (3rd Cir. 1987).

322. *Monsanto*, 467 U.S. at 1005.

323. *Id.*; *see also Penn Central*, 438 U.S. at 138.

324. *Penn Central*, 483 U.S. at 825.

325. Tri-Bio Labs, 836 F.2d at 141.

326. Philip Morris, Inc. v. Reilly, 312 F.3d 24, 38 (1st Cir. 2002).

Monsanto line of cases to cover cases where there was citizen reliance, but estoppel is not an appropriate remedy. In those situations, the Taking Clause can be the basis for a monetary remedy. Courts should focus on the facts of the case, the degree of reliance, the reasonableness of the reliance, and the reasons for the takings in assessing the extent of the damages.

2. *The Reliance Act*

An alternative to both Schwartz's solution and a takings remedy is to enact a legislative act that would protect reliance. The act should address both situations that would be required to qualify as well as the remedy. The advantage of the statutory route is that it can offer a change without having to wait for an appropriate case to make its way to the Supreme Court, which, given the Court's previous estoppel jurisprudence, may take a while. The statute can also set out guidelines. Statutes have also been passed before protecting reliance, so there is precedent for enacting one like this.[327]

What should the act say?

PROTECTION OF RELIANCE ACT:

1. If an individual or corporation demonstrates that:
    a. The individual or corporation received:
        i. Individualized advice from government on how to comply with a legal requirement. Or
        ii. A promise from the government as to how a certain requirement will be enforced. Or
        iii. Another individualized representation on which the government should have known the affected person would rely.
    b. Relied on that advice.
    c. And would suffer harm if the government went back on its advice, representation or promise,

    The citizen is entitled to one of the remedies offered in section 2.

327. Schwartz, *supra* note 5, at 653.

2. Remedies: An agency or reviewing court will provide the affected person with the most equitable remedy, balancing the harm to the individual with the public interest.
    a. Direct enforcement of the initial representation, notwithstanding any statutory provision to the contrary.
    b. Monetary damages in an amount sufficient to compensate the affected person for her reliance.
3. The government may not award a remedy if it demonstrates that reliance on the advice, promise or representation was unreasonable.

Conclusion

In *Merrill,* the Supreme Court decided that the cost of protecting reliance is too high. In hindsight, it seems the Court did not give sufficient weight to the harm the individual suffers from such a doctrine and may have overestimated the public dangers. The Court's concern about separation of powers and legality are real enough and powerful—but they do not call for the stringent estoppel doctrine that the Court used. This article suggests that there are at least two ways to soften the doctrine: a judicial remedy and a legislative one.